Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GUSTAVO VILLANUEVA-SOTELO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal aggravated identity theft statute prescribes a mandatory two-year term of imprisonment for any person who, "during and in relation to" certain other specified crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The question presented is whether, in order to obtain a conviction under Section 1028A(a)(1), the government must establish that the defendant knew that the "means of identification" in question belonged to another person.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 515 F.3d 1234.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 56a-57a) was entered on February 15, 2008. A petition for rehearing was denied on June 13, 2008 (App., *infra*, 81a-84a). On August 28, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 11, 2007. On September 19, 2008, the Chief Justice further extended the

time to November 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1028A(a)(1) of Title 18, United States Code, provides:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. 1028A(a)(1).

STATEMENT

Respondent was charged in a three-count indictment with unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1) (Count 1), possessing a fraudulent document prescribed for authorized stay or employment in the United States, in violation of 18 U.S.C. 1546(a) (Count 2), and aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1) (Count 3). Respondent pleaded guilty to Counts 1 and 2 and the district court granted his motion to dismiss Count 3. He was sentenced to 18 months of imprisonment. A divided panel of the court of appeals affirmed the district court's dismissal of Count 3. App., *infra*, 1a-55a.

1. Respondent is a Mexican citizen who has illegally entered the United States at least three times. In August 2006, a District of Columbia police officer approached respondent and asked him for identification. Respondent presented the officer with what appeared to be a valid permanent resident card. The card contained

respondent's name and photograph and an alien registration number that had been assigned to another person. Respondent acknowledges that he knew that the permanent resident card was a fake. In turn, the government does not dispute that it cannot establish that respondent knew that the alien registration number displayed on the card had been assigned to an actual person. App., *infra*, 2a.

2. The district court granted respondent's motion to dismiss the aggravated identity theft count. The court concluded that Section 1028A(a)(1) requires the government to prove that the defendant knew that the "means of identification" in question belonged to an actual person. App., *infra*, 58a-80a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-55a.

a. The majority concluded "that section 1028A(a)(1)'s mens rea requirement extends to the phrase 'of another person,' meaning that the government must prove the defendant actually knew the identification in question belonged to someone else." App., *infra*, 2a. The majority acknowledged that its holding squarely conflicted with the decisions of two other circuits. See *id.* at 15a (citing *United States* v. *Montejo*, 442 F.3d 213 (4th Cir.), cert. denied, 549 U.S. 879 (2006), and *United States* v. *Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008)).

b. Judge Henderson dissented. App., *infra*, 31a-55a. In her view, Section 1028A(a)(1) "does not require the Government to prove that the defendant know that the false 'means of identification' he possesses is that 'of another person.'" *Id.* at 55a (quoting 18 U.S.C. 1028A(a)(1)).

4. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 81a-84a. Chief Judge Sentelle and Judges Henderson and Kavanaugh voted to grant rehearing en banc, *id.* at 81a, and Judge Henderson filed an opinion dissenting from the denial of rehearing en banc, *id.* at 83a-84a.

REASONS FOR GRANTING THE PETITION

In this case, the D.C. Circuit held that Section 1028A(a)(1)'s "mens rea requirement extends to the phrase 'of another person,'" and that, as a result, "the government must prove the defendant actually knew the identification in question belonged to someone else." App., *infra*, 2a. On October 20, 2008, the Court granted a writ of certiorari in *Flores-Figueroa* v. *United States*, No. 08-108, to consider that question. Because this case presents the same question as *Flores-Figueroa*, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Flores-Figueroa*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Flores-Figueroa* v. *United States*, No. 08-108, and then disposed of accordingly.

Respectfully submitted.

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NOVEMBER 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3055

UNITED STATES OF AMERICA, APPELLANT

v.

GUSTAVO VILLANUEVA-SOTELO, APPELLEE

Argued: Nov. 2, 2007
Decided: Feb. 15, 2008

Before: HENDERSON and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge TATEL.

Dissenting opinion filed by Circuit Judge HENDERSON.

TATEL, Circuit Judge:

The federal "[a]ggravated identity theft" statute imposes two additional years of imprisonment on any person who during the commission of an enumerated felony "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The question before us is this: to obtain a conviction under section 1028A(a)(1), must the government prove the defendant *knew* the "means of identification" he "transfer[red], possesse[d], or

use[d]" actually belonged to "another person," or is it sufficient for the government to show that the means of identification *happened* to belong to another person? Based on the statute's text, purpose, and legislative history—and mindful that the rule of lenity comes into play when, after resort to the traditional tools of statutory interpretation, reasonable doubt remains as to the statute's meaning—we hold that section 1028A(a)(1)'s mens rea requirement extends to the phrase "of another person," meaning that the government must prove the defendant actually knew the identification in question belonged to someone else.

I.

Defendant Gustavo Villanueva-Sotelo, a Mexican national, has entered the United States illegally three times and has been deported twice. In August 2006, District of Columbia Metropolitan Police approached Villanueva-Sotelo and asked him for identification. Villanueva-Sotelo presented the officers with what appeared to be a permanent resident card—an official document issued by the Department of Homeland Security proving its holder is authorized to stay or work in the United States. Villanueva-Sotelo's card displayed his own name and photograph, listed Mexico as his country of origin, and included an alien registration number. Villanueva-Sotelo admits he knew the card was a fake. Although the government can prove that the alien registration number displayed on the card belonged to another individual, it concedes—critically for this case—that it lacks any evidence that Villanueva-Sotelo actually knew this.

The government charged Villanueva-Sotelo with unlawful entry of a removed alien in violation of 8 U.S.C.

§ 1326(a) and (b)(1) (count one), possession of a fraudulent document prescribed for authorized stay or employment in the United States in violation of 18 U.S.C. § 1546(a) (count two), and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) (count three). In full, the identity theft statute reads: "Whoever, during and in relation to any felony violation enumerated in subsection (c), *knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person* shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." *Id.* (emphasis added).

Villanueva-Sotelo pled guilty to the first two counts but moved to dismiss count three, the aggravated identity theft charge, arguing that section 1028A(a)(1) requires the government to prove he actually knew the alien registration number belonged to another person. Agreeing with the defendant, Judge Friedman held that the word "knowingly" in section 1028A(a)(1) must "modify both the verbs and the object, that is, 'means of identification of another person.'" Hr'g Tr. at 50 (Apr. 4, 2007). In reaching this conclusion, the Judge found the following exchange with the prosecutor particularly illuminating:

> [PROSECUTOR]: [I]t is stealing in the sense that if I make up a number and it belongs to someone else, I have taken that person's number that was rightfully assigned by a U.S. agency.
>
> THE COURT: If you make up the number?
>
> [PROSECUTOR]: Yes. If I—

> THE COURT: What if you make up a number that doesn't belong to anybody?
>
> [PROSECUTOR]: Then you don't charge the offense, there is no offense because it's not a means of identification of another person.
>
> THE COURT: So if the defendant picked a number out of the air and it was [your] number, he's guilty, but if he picked a number out of the air and [Immigration and Customs Enforcement] hasn't assigned it to anybody, he's not guilty?
>
> [PROSECUTOR]: That's correct.

Id. at 15. Unable to conclude that a scenario like this amounts to identity theft, *see id.* at 48, Judge Friedman granted Villanueva-Sotelo's motion to dismiss count three.

The government now appeals. Because this case presents a pure question of statutory interpretation, we review the district court's decision de novo. *See Butler v. West*, 164 F.3d 634, 639 (D.C. Cir. 1999).

II.

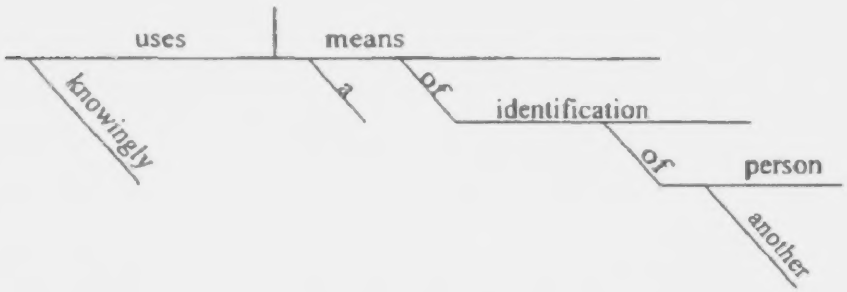
Our interpretive task begins with the statute's language. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). We must first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). If it does, our inquiry ends and we apply the statute's plain language. *See Sigmon Coal*, 534 U.S. at 450, 122 S. Ct. 941. But if we find the statutory language ambiguous, we look beyond the text for other indicia of

congressional intent. *See Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) ("[D]etermining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" (omission in original) (quoting *United States v. Balint*, 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604 (1922))).

Reduced to its essence, section 1028A(a)(1) reads as follows: "Whoever . . . knowingly . . . uses, without lawful authority, a means of identification of another person shall . . . be sentenced to a term of imprisonment of 2 years." According to the government, this text is unambiguous: the statute's knowledge requirement extends only so far as "means of identification," requiring no proof the defendant knew the identification belonged to "another person." For his part, Villanueva-Sotelo contends the statute is ambiguous and that the provision's title, purpose, and legislative history reveal Congress's intent to extend the mens rea requirement throughout the entire sentence, namely all the way to "of another person." We agree with the defendant. Although the government's interpretation is plausible, nothing suggests it represents the only possible—or even the most plausible—reading of section 1028A(a)(1). *See McCreary v. Offner*, 172 F.3d 76, 82 (D.C. Cir. 1999) (finding a statute ambiguous because it was "reasonably susceptible to more than one meaning"); *see also Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 4 (D.C. Cir. 1999) ("Although the inference petitioner would draw as to the statute's meaning is not by any means unreasonable, it is also not inevitable.").

The parties focus on the word "knowingly," debating whether that adverb modified the phrase "of another

person." But a simply diagram of the relevant statutory text readily demonstrates that, from a grammatical point of view, this is not the correct question:



The word "knowingly" technically modifies only the verb that follows it ("uses"). It *modifies* neither the direct object ("means") nor the two prepositional phrases that follow ("of identification of another person:"). *See* ROBERT FUNK ET AL., THE ELEMENTS OF GRAMMAR FOR WRITERS 62 (MacMillan 1991) ("An adverb, in standard English, modifies almost anything except a noun.").

In the end, this grammatical observation is beside the point given that the parties, as well as relevant case law interpreting similarly structured statutes (cases we discuss below), are best understood as using the word "modify" more loosely, equating it with words such as "apply," "'extend,"or "attach." *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); *Liparota v. United States*, 471 U.S. 419, 424-25 n.7, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985); *United States v. Nofziger*, 878 F.2d 442, 446 (D.C. Cir. 1989). Thus, framing the question in terms of statutory interpretation, we ask how far section

1028A(a)(1)'s mens rea requirement—"knowingly"—reaches in the statute.

That question requires us to focus on the statute's direct object, "means." "Means" is modified by the prepositional phrase "of identification," which, in turn, is modified by a second prepositional phrase, "of another person." As the government concedes, the mens rea requirement must extend at least to the direct object's principal modifier, "of identification." Were it otherwise, a person could be convicted for "knowingly us[ing] or transfer[ring]," without lawful authority, anything at all that happened to contain a means of identification. As one district court explained:

> If during a bank fraud conspiracy, I hand a defendant a sealed envelope asking her to transfer it and its contents to another and she knowingly does so, she has knowingly transferred the envelope and its contents. But if she believes my statement that the envelope contains only a birthday card when in fact it contains a forged social security card, the government surely would not contend that she should receive the enhanced penalty.

United States v. Godin, 476 F. Supp. 2d 1, 2 (D. Me. 2007). And it goes without saying that the mens rea requirement must also reach beyond the bare direct object "means" to its first modifying phrase "of identification," lest the sentence become gibberish: "knowingly using a means" means nothing.

But what of the second and crucial prepositional phrase "of another person"? Does section 1028A(a)(1)'s mens rea requirement apply to it as well? The government is certainly correct that the statute's knowledge

requirement might apply only to the direct object's first prepositional phrase, thereby criminalizing "knowingly transfer[ing], possess[ing], or us[ing] . . . a means of identification" that happens to belong to another. Indeed, as the dissent points out, Congress knows how to draft a statute that unambiguously extends a mens rea requirement to various elements in the statutory text. *See* Dissenting Op. at 1256 (citing 18 U.S.C. § 1546(a)). But with regard to section 1028A(a)(1), the defendant's view—that the statute's mens rea requirement extends all the way to "of another person"—is at least equally plausible. Neither the government nor the dissent offers a convincing reason, nor are we aware of one, demanding that the statute's mens rea requirement halt after "of identification" rather than proceed to "of another person." Indeed, the Model Penal Code adopts as a general principle of construction a rule under which, absent evidence to the contrary, the mens rea requirement encompasses all material elements of an offense. *See* MODEL PENAL CODE § 2.02(4) (1985) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."); *see also X-Citement Video*, 513 U.S. at 79, 115 S. Ct. 464 (Stevens, J., concurring) ("[T]he normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection.").

A simple rewrite of the statute further underscores the plausibility of Villanueva-Sotelo's interpretation. Suppose section 1028A(a)(1) had read, "whoever know-

ingly uses . . . another person's means of identification." Written that way, the statute would most plausibly require proof that the defendant actually knew the means of identification used belonged to someone else, and as government counsel agreed at oral argument, the phrases "means of identification of another person" and "another person's means of identification" carry precisely the same meaning. Oral Arg. at 5:13-:33, 7:49-8:02. True, Congress used a cumbersome prepositional phrase rather than the more elegant possessive form, but we see nothing of significance in that syntactic choice.

Two additional factors reinforce our conclusion that section 1028A(a)(1) is ambiguous. First, the next provision of the same statute, section 1028A(a)(2), increases penalties for identity theft perpetrated in connection with "[t]errorism offense[s]." 18 U.S.C. § 1028A(a)(2). Structured nearly identically to subsection (a)(1), that provision reads:

> Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person *or a false identification document* shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

Id. (emphasis added). The government concedes that section 1028A(a)(2)'s knowledge requirement must apply to the whole phrase "false identification document." Oral Arg. at 8:43-:58, 9:30-:48. Thus, as a matter of pure textual distance, the mens rea requirement travels farther in subsection (a)(2) than the government claims

possible in subsection (a)(1). Indeed, under the government's interpretation, "knowingly" must skip over the contested phrase "of another person" and then, suddenly resuming its influence, apply to "false identification document." Moreover, if Congress had intended section 1028A(a)(2)'s mens rea requirement to reach beyond "identification document" to embrace the fact of its falsity, it seems equally likely that Congress intended a parallel application regarding the phrase "means of identification of another person"—precisely the same language at issue in section 1028A(a)(1). As the Supreme Court has observed, "it is difficult to conclude that the word 'knowingly' modifies one of the elements in [a] subsection[ ] . . . but not the other." *X-Citement Video*, 513 U.S. at 77-78, 115 S.Ct. 464. And if "knowingly transfers, possesses, or uses" acts upon the direct object and its modifiers in subsection (a)(2), we think it quite reasonable to conclude that it could do the same in subsection (a)(1).

Second, we have previously found similarly structured statutes to be ambiguous. For instance, in *United States v. Nofziger*, 878 F.2d 442, we considered a statute prohibiting former government employees from lobbying their former agencies. In relevant part, that statute prohibited covered employees from "*knowingly* . . . with the intent to influence, *mak[ing] any oral or written communication* . . . to the department or agency in which he served . . . in connection with any . . . particular matter . . . in which such department or agency has a *direct and substantial interest*." 18 U.S.C. § 207(c) (1982) (emphasis added). There, as here, "[t]he principal dispute in th[e] case [was] over the reach of the word 'knowingly.'" *Nofziger*, 878 F.2d at 444. While

Nofziger, a former White House advisor convicted under this statute for improperly communicating with his former employer, argued that the government had to "show[ ] that he had knowledge that the agency had a 'direct or substantial' interest in the matter," the government urged a more limited application of the statute's mens rea requirement. *Id.* at 446. Ultimately agreeing with Nofziger and observing that the statute was "hardly a model of clarity," *id.* at 445 (citation omitted), we found the provision ambiguous, stating that "'knowingly' can reasonably be read to apply to all elements of the . . . offense, including the 'direct or substantial interest' element." *Id.* at 447; *see also id.* ("[T]he . . . language . . . clearly permits the inference that 'knowingly' attaches to all elements of the . . . offense."). So too here. Text alone cannot resolve this case because "knowingly" may "apply to all elements of the . . . offense," *id.*, including the requirement that the identification used belong to "another person."

Likewise, in *United States v. Chin*, 981 F.2d 1275 (D.C. Cir. 1992), we confronted a statute making it a crime for any adult "knowingly and intentionally" to "employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any [listed federal drug offense]." 21 U.S.C. § 861(a)(2). Again observing that the statute was "not a model of meticulous drafting," we explained that "[o]*ne cannot tell from the words alone* whether the person's juvenile status must be known . . . or whether it suffices that the act of using a person to avoid detection be 'knowing[ ] and intentional[ ].'" *Chin*, 981 F.2d at 1279 (emphasis added)

(second and third alterations in original). Here, faced with similarly ambiguous text, we "cannot tell from the words alone," *id.*, whether section 1028A(a)(1) requires the defendant to know that the means of identification he used belonged to another person, or whether it suffices that the act of "transfer[ring], possess[ing], or us[ing] . . . a means of identification" be done "knowingly." 18 U.S.C. § 1028A(a)(1). To be sure, in *Chin* we ultimately held that the statute required no proof the defendant knew the person used was a minor, but we did so only after investigating the statute's purpose and finding Congress's intent to protect minors as a class "fairly implied." 981 F.2d at 1280. Although the government now urges us to follow *Chin* by refusing to extend "knowingly" throughout section 1028A(a)(1), it ignores *Chin*'s holding that text alone failed to resolve the case.

The Supreme Court has also provided useful guidance on how to interpret statutes constructed like section 1028A(a)(1). In *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L. Ed. 2d 434, the Court wrestled with a federal food stamp statute that read: "[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]" is subject to a fine and imprisonment. 7 U.S.C. § 2024(b)(1) (1982). The parties disputed whether the statute's knowledge requirement applied to the phrase "in any manner not authorized by [law]." Text alone, the Court explained, provided no answer:

> Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word "knowingly" to require some mental state with respect to some element of the crime defined in [the statute], the interpretations

> proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.

Liparota, 471 U.S. at 424, 105 S. Ct. 2084 (third emphasis added). By way of analogy, the Court made the same point in a footnote:

> Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit" from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? *As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel—whether it modifies "sells," or "sells a security," or "sells a security without a permit."*

Id. at 424-25 n.7, 105 S. Ct. 2084 (emphasis added) (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972)); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 705, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005) ("We have recognized with regard to similar statutory language that the mens rea at least applies to the acts that immediately follow, if not to other elements down the statutory chain." (emphasis added)).

As in the statutes at issue in *Liparota*, *Chin*, and *Nofziger*, the word "knowingly" appears in section 1028A(a)(1) before a verb or series of verbs, a direct object, and at least one other term further describing that object. Here, as in those cases, the government and defendant contest the knowledge requirement's reach. And here, as in those cases, "either interpretation would accord with ordinary usage." *Liparota*, 471 U.S. at 424, 105 S.Ct. 2084.

Ignoring the Supreme Court's clear finding that text alone cannot resolve statutes structured this way, the government and dissent argue that *Liparota*, reinforced by *X-Citement Video*, demonstrates that the Court will extend a knowledge requirement only when failing to do so could criminalize otherwise innocent conduct—a concern not present here because section 1028A(a)(1) requires a predicate felony offense. *See* Dissenting Op. at 1257-60. True, the Court has found it "particularly appropriate" to extend a mens rea requirement when failure to do so would result in a statute criminalizing nonculpable conduct. *Arthur Andersen*, 544 U.S. at 703, 125 S. Ct. 2129; *Liparota*, 471 U.S. at 426, 105 S. Ct. 2084; *see also Staples*, 511 U.S. at 610, 114 S. Ct. 1793 ("[We have taken] particular care . . . to avoid construing a statute to dispense with mens rea where doing so would 'criminalize a broad range of apparently innocent conduct.'" (quoting *Liparota*, 471 U.S. at 426, 105 S. Ct. 2084)). But the Court has never held that avoiding such a result is the only reason to do so. Thus, while "[t]he presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct,'" *Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) (emphasis added)

(quoting *X-Citement Video*, 513 U.S. at 72, 115 S. Ct. 464), courts may extend a mens rea requirement when ordinary tools of statutory interpretation—text, structure, purpose, and legislative history—compel that result. Accordingly, *Liparota*'s concern with criminalizing nonculpable conduct has no bearing on the threshold issue before us—whether section 1028A(a)(1) is ambiguous.

In answering that question in the affirmative, we acknowledge, as the government emphasizes, that the Fourth Circuit reached the opposite conclusion in *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006), *cert. denied*, __U.S. __, 127 S. Ct. 366, 166 L. Ed .2d 138 (2007). Finding section 1028A(a)(1) unambiguous, our neighboring circuit reasoned that "as a matter of common usage, 'knowingly' does not modify the entire lengthy predicate that follows it." *Id.* at 215. Although the Eleventh Circuit, along with several district courts, has adopted this interpretation, *see, e.g.*, *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam); *United States v. Godin*, 489 F. Supp. 2d 118 (D. Me. 2007); *United States v. Contreras-Macedas*, 437 F. Supp. 2d 69 (D.D.C. 2006), other district courts have found section 1028A(a)(1) ambiguous and embraced the defendant's view. *See United States v. SalazarMontero*, 520 F. Supp. 2d 1079 (N.D. Iowa 2007); *United States v. Beachem*, 399 F. Supp. 2d 1156 (W.D. Wash. 2005).

We respectfully disagree with *Montejo*. Although the court there correctly concluded that the adverb "knowingly" modifies only the verbs "transfers, possesses, [and] uses," *see* 442 F.3d at 215 (alteration in original), that grammatical observation, as explained above, fails to resolve the key question, namely, how far

does the statute's mens rea requirement extend? *Montejo*'s observation that "knowingly" must rest "adjacent to the words it modifies, as close as it can get" provides no help either. *Id.* at 216. As one district court interpreting section 1028A(a)(1) observed, "'knowingly' has been placed as close as possible to the entire, indivisible predicate: 'transfers, possesses, or uses, without lawful authority, a means of identification of another person.'" *Salazar-Montero*, at 1090. Moreover, *Liparota*'s observation that statutes structured like 1028A(a)(1) are ambiguous "[a]s a matter of grammar," 471 U.S. at 425 n.7, 105 S. Ct. 2084, fatally undermines *Montejo*'s reliance on "common usage." 442 F.3d at 215. Indeed, the Fourth Circuit expressly acknowledged that in *Liparota* the Court found both "interpretation[s] of the scope of the term 'knowingly' . . . in accord with common usage." *Id.* at 216.

III.

Having found section 1028A(a)(1) ambiguous, "we seek guidance in the statutory structure, relevant legislative history, [and] congressional purposes expressed in the [statute]." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). According to the government, the legislative history demonstrates that "Congress intended to criminalize the knowing possession of fraudulent identity documents, even if the defendants lacked the specific knowledge that they possessed a real person's means of identification." Appellant's Opening Br. 18. The dissent agrees. *See* Dissenting Op. at 1254. Reading the legislative history differently, Villanueva-Sotelo argues that Congress intended to target identity theft and the thieves who perpetrate it, rather than to create a sentencing en-

hancement for individuals who use fraudulent identifying information belonging purely by happenstance to someone else. Again, we agree with Villanueva-Sotelo.

We begin with section 1028A's title: "[a]ggravated identity theft." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (citation and internal quotation marks omitted)); *see also Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) ("For interpretive purposes, [the title is] of use only when [it] shed[s] light on some ambiguous word or phrase." (second and third alterations in original) (citation and internal quotation marks omitted)). As that title demonstrates, the statute concerns "theft," i.e., "the felonious taking and removing of personal property *with intent to deprive the rightful owner of it.*" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2369 (1993) (emphasis added); *see also* BLACK'S LAW DICTIONARY 1516 (8th ed. 2004) ("The felonious taking and removing of another's personal property with the intent of depriving the true owner of it."). Yet Villanueva-Sotelo, having had no idea that his forged alien registration number belonged to anyone at all, couldn't possibly have had the intent to deprive another person of his or her identity. True, Villanueva-Sotelo had a guilty mind—he knowingly presented a fake permanent resident card to D.C. police officers—but he pled guilty to precisely that charge in the indictment's second count and is being punished accordingly.

Judge Friedman's colloquy with the prosecutor, *see supra* at 1236 37, reveals just how far the government's

interpretation departs from the statute's focus on "theft." As the government argued in the district court and reiterated at oral argument here, a defendant could pick a series of numbers out of the air and win two extra years in prison if those numbers happened to coincide with an assigned identification number, yet escape punishment under section 1028A(a)(1) had he picked a slightly different string of random numbers. *See* Hr'g Tr. at 15, 48. That's not theft. Judge Friedman could not square the government's position with congressional intent, nor can we.

That Congress intended section 1028A(a)(1) to single out thieves—in the traditional sense of the word—for enhanced punishment finds additional support in the statute's legislative history. Frustrated that "many identity thieves receive short terms of imprisonment or probation," H.R. Rep. No. 108-528, at 3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 780, Congress passed section 1028A(a)(1) as part of the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004). The House Judiciary Committee Report accompanying the Act repeatedly emphasizes Congress's intent to target and punish "identity *thieves*" who "*steal* identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes." H.R. Rep. No. 108-528, at 3, 2004 U.S.C.C.A.N. at 780 (emphases added). The report further explains: "'The terms 'identity theft' and 'identity fraud' refer to all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits." *Id.* at 4, 2004 U.S.C.C.A.N. at 780. Although whether a person who imagines a string of random numbers has "wrong-

fully obtain[ed]" personal data is debatable, section 1028A(a)(1)'s legislative history demonstrates that at least for purposes of this statute, Congress has already answered that question in the negative. The House Report describes identity theft in detail, providing a series of examples of how one "wrongfully obtains" another person's personal data. The report first describes how "identity thieves" operate, explaining that they

> obtain[ ] individuals' personal information for misuse not only through "dumpster diving," but also through accessing information that was originally collected for an authorized purpose. The information is accessed either by employees of the company or of a third party that is authorized to access the accounts in the normal course of business, or by outside individuals who hack into computers or steal paperwork likely to contain personal information.

Id. at 4-5, 2004 U.S.C.C.A.N. at 781. The report then lists a string of cases in which convicted identity thieves escaped with relatively light sentences, all of which involved defendants who, unlike Villanueva-Sotelo, knew the identification they used belonged to another. Focusing on the immigration context, the report mentions a case in which a Mexican resident obtained federal benefits by using "the name and Social Security number of his former brother-in-law, a U.S. citizen." *Id.* at 6, 2004 U.S.C.C.A.N. at 781. Other examples cited include a woman who used her husband's social security number to obtain disability benefits, a health club worker who used a "skimmer" to obtain credit card data from the club's members, and a bank employee who accessed the bank's computer files to obtain customer account information. *Id.* at 5-6, 2004 U.S.C.C.A.N. at 781. In each of

these examples, the thief knew the stolen information belonged to another person—indeed, that was the very essence of the crime.

The floor debate reveals a similar emphasis on theft. Representative Sensenbrenner, the House Judiciary Committee Chair and the bill's floor manager, explained, "This legislation will allow prosecutors to identify identity thieves who steal an identity, sometimes hundreds or even thousands of identities, for purposes of committing one or more crimes." 150 Cong. Rec. H4809 (daily ed. June 23, 2004) (statement of Rep. Sensenbrenner). Representative Carter, the Act's author and lead sponsor, likewise explained that the legislation would "facilitate the prosecution of criminals who steal identities in order to commit felonies," recounting a case in which a "Texas driver's license bureau clerk pleaded guilty to selling ID cards to illegal immigrants using stolen information from immigration papers." *Id.* at H4810 (statement of Rep. Carter). At no point in the legislative record did anyone so much as allude to a situation in which a defendant "wrongfully obtain[ed]" another person's personal information unknowingly, unwittingly, and without intent.

In support of the contrary position—that Congress targeted not just thieves, but also anyone using a false identification document happening to belong to another person—the government directs us to the following language from the House Report:

> This section amends Title 18 to provide for a mandatory consecutive penalty enhancement of 2 years for any individual who knowingly transfers, possesses, or uses the means of identification of another person in order to commit a serious Federal predicate of-

> fense (. . . including immigration violations, false citizenship crimes, firearms offenses, and other serious crimes).

H.R. Rep. No. 108-528, at 10, 2004 U.S.C.C.A.N. at 780. But as the Supreme Court stated when confronting similarly unilluminating legislative history, "[w]e fail to see how this sentence, which merely parrots the terms of the statute, offers any enlightenment as to what those terms mean." *Liparota*, 471 U.S. at 430-31 n.13, 105 S. Ct. 2084.

As for the long list of examples evincing the statute's focus on intentional theft, the government and our dissenting colleague argue that Congress wished to highlight only the most egregious examples of identity theft without limiting the statute's reach to those examples. *See* Dissenting Op. at 1253. This point would carry more weight were the list the only evidence of congressional intent. But it isn't. Viewing the list in combination with the statute's title and the legislative record as a whole, we think it clear that Congress never intended its "aggravated identity theft" statute to reach conduct like Villanueva-Sotelo's.

Next, pointing to some of the same legislative history recounted above, the government and dissent contend that Congress desired to make it easier for prosecutors "to convict identity thieves" and to enhance their punishments accordingly. H.R. Rep. No. 108-528, at 10, 2004 U.S.C.C.A.N. at 780; Dissenting Op. at 1255. We agree, but that begs the question before us: did Congress consider a defendant like Villanueva-Sotelo to be an identity thief subject to prosecution under this statute? All of the legislative history the government cites presupposes the answer to that question.

Finally, the government urges us to disregard the "brief" legislative discussion surrounding section 1028A(a)(1), Appellant's Opening Br. 18, and to look instead to section 1028(a)(7), a nearby provision amended at the same time Congress passed section 1028A(a)(1). *See* 18 U.S.C. § 1028(a)(7) ("Whoever . . . knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law . . . shall be punished as provided . . . ."). Because we find plenty in section 1028A's legislative history revealing congressional intent regarding that provision, we see little reason to look to other statutes for guidance. In any event, the legislative discussion surrounding section 1028(a)(7) offers the government no help. Congress amended section 1028(a)(7) to ease the prosecution of identity thieves who intend to use "another person's means of identification" (note the use of the possessive form, *see supra* at 1239-40) to commit a felony, but have not yet actually done so. *See* H.R. Rep. No. 108-528, at 10-11, 2004 U.S.C.C.A.N. at 786. This tells us nothing about whether conduct like Villanueva-Sotelo's amounts to "identity theft" in the first place. Moreover, according to the House Report, the amendment targeted those "who knowingly facilitate the operations of an identity-theft ring by stealing, hacking, or otherwise gathering in an unauthorized way other people's means of identification, but who may deny that they had the specific intent to engage in a particular fraud scheme." *Id.* at 11, 2004 U.S.C.C.A.N. at 786. Far removed from the issue we face here, that scenario underscores the extent to which Congress intended to sin-

gle out and punish those who knowingly steal others' identities.

In short, there is a salient difference between theft and accidental misappropriation. While Villanueva-Sotelo surely misappropriated someone else's alien registration number, no evidence shows he stole it in any meaningful sense. As the first district court to interpret this statute observed, and as the government concedes, "it is odd—and borders on the absurd—to call what [the defendant] did 'theft.'" *United States v. Montejo*, 353 F. Supp. 2d 643, 654 (E.D. Va. 2005), *aff'd*, 442 F.3d 213; *see also No Need to Show ID Theft for an ID Theft Conviction*, 30 NAT'L L.J., Dec. 3, 2007, at 14 (describing the Eleventh Circuit's decision in *United States v. Hurtado*, 508 F.3d 603). But "theft" is precisely what Congress targeted when it passed section 1028A(a)(1). Because Congress intended to express "the moral condemnation of the community," *United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971), by enhancing penalties for thieves who steal identities, we hold that section 1028A(a)(1)'s mens rea requirement extends to the "[a]ggravated identity theft" statute's defining element—that the means of identification used belongs to another person.

Even if we harbored any doubt about this—that is, were we unable to find "an unambiguous intent on the part of Congress"—we would "turn to the rule of lenity to resolve the dispute." *United States v. West*, 393 F.3d 1302, 1311 (D.C. Cir. 2005); *see also Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the lan-

guage and structure, legislative history, and motivating policies' of the statute." (quoting *Bifulco v. United States*, 447 U.S. 381, 387, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980))). Although "[t]he rule of lenity is not invoked by a grammatical possibility" and "does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose," *Caron v. United States*, 524 U.S. 308, 316, 118 S. Ct. 2007, 141 L. Ed. 2d 303 (1998), the defendant's reading is quite plausible. Thus, even if the legislative history failed to resolve the statute's ambiguity, the rule of lenity would forbid us from "interpret[ing] a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958).

IV.

We have several additional reactions to the dissent. To begin with, its view of the statute is not entirely clear. The dissent first seems to agree that section 1028A(a)(1) is ambiguous, relying on legislative history to discern the statute's meaning. *See* Dissenting Op. at 1251-55. Elsewhere, however, the dissent concludes that the statute's text is clear, making resort to legislative history and congressional intent unnecessary. *See id.* at 1240-41.

The dissent accuses us of grafting a common-law definition of theft onto the statute when what is required is "construction of the statute and . . . inference of the intent of Congress." *Id.* at 1237 (quoting *Staples*, 511 U.S. at 605, 114 S. Ct. 1793). But as our discussion indicates, *see supra* at 1242-46, we have done just what the

dissent urges: construed the statute and inferred Congress's intent using the everyday definition of "theft"—as found in section 1028A's title and throughout its legislative history—as but one tool among others.

The dissent next points to the same House Report language we do, *see supra* at 1243-44, namely that "[t]he terms 'identity theft' and 'identity fraud' refer to all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception." H.R. Rep. No. 108-528, at 4, 2004 U.S.C.C.A.N. at 780. According to the dissent, this sentence, particularly its reference to "identity fraud," means that "identity 'theft'" must "be read generically." Dissenting Op. at 1253. Given the legislative record's overwhelming number of references to "theft," "thieves," and "stealing," plus the statute's title and the Judiciary Committee's many citations to examples of knowing theft, the report's passing references to "identity fraud" hardly support a conclusion that Congress clearly intended to impose two additional years of punishment on a defendant who happens to pick a number that turns out to belong to someone else rather than one assigned to no one. In any case, unlike the dissent, we are prepared to acknowledge that although the vast weight of the legislative history supports our interpretation, some bits of it arguably cut the other way—namely, the evidence the dissent cites in support of its claim that "a primary purpose of the statute was to" ensure "that the punishment more closely fits the harm the crime causes its victim." *See* Dissenting Op. at 1254 & n.1254. This concession, however, merely reinforces the need for the rule of lenity to resolve any remaining ambiguities, for "where text, structure, and history fail to establish that the Government's position is unambiguously cor-

rect[,] we apply the rule of lenity and resolve the ambiguity in [the defendant]'s favor." *United States v. Granderson*, 511 U.S. 39, 54, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994).

The dissent cites a series of cases in which defendants engaged in otherwise culpable conduct were required to "ascertain at [their] peril whether [their actions] c[a]me[ ] within the inhibition of the statute." Dissenting Op. at 1261 (quoting *United States v. Freed*, 401 U.S. 601, 609, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971)). Unlike in those cases, however, here we have evidence that Congress intended to limit section 1028A(a)(1) to theft, and we are bound to interpret the statute in light of that expressed intent.

Next, the dissent points to 18 U.S.C. § 1546(a), which provides that "[w]hoever *knowingly* . . . uses . . . [an] alien registration receipt card . . . *knowing it to be forged* . . . [s]hall be fined under this title or imprisoned." *Id.* (emphasis added). Reading this statute *in pari materia* with section 1028A(a)(1), which contains no similar repetition of the knowledge requirement, the dissent concludes that Congress could not have intended section 1028A(a)(1) to require a showing that the defendant knew the means of identification used belonged to another person. *See* Dissenting Op. at 1256 & n.12. Even assuming the *in pari materia* doctrine applies here, sections 1546(a) and 1028A(a)(1) are easily harmonized when read in tandem: defendants who use a false alien registration number are punished under the former statute (as was Villanueva-Sotelo), while those who know that number belongs to someone else receive two additional years under the latter.

In any event, we doubt whether *in pari materia* applies to these statutes. As the very treatise cited by our dissenting colleague explains, courts often ask four questions when deciding if statutes are similar enough to justify reading them *in pari materia*. The answers to all four questions counsel against applying the canon here. First, were "the two statutes . . . contained in the same legislative act"? 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000 & Supp. 2007-2008). Here, they weren't. Second, do the two statutes require "the same elements of proof"? *Id.* Here, as the dissent emphasizes, they don't. *See* Dissenting Op. at 1257. Third, are the penalties the same for both statutes? 2B SINGER, *supra*, § 51:3. Here, they're not. And finally, were the two statutes "obviously designed to serve the same purpose and objective"? *Id.* Answering this last question requires a bit more explanation. As the dissent points out, section 1028A(c)(7), which lists the many predicate offenses triggering the aggravated identity theft statute, incorporates by reference section 1546(a), and both statutes involve "possession of a false means of identification." Dissenting Op. at 1257 n.12. True enough, but section 1028A references as predicate offenses a myriad of other federal statutes whose subject matter includes such disparate topics as immigration, social security, embezzlement of public funds, visas, and firearms. *See* 18 U.S.C. § 1028A(c) (listing predicate felony offenses). We think it stretches the *in pari materia* canon beyond reason to apply it to such a wide swath of the United States Code. As for the dissent's observation that sections 1546(a) and 1028A share the same subject matter, "[c]haracterization of the object or purpose is more important than characterization of subject matter in determining

whether different statutes are closely enough related to justify interpreting one in light of the other." 2B SINGER, *supra*, § 51:3. Here, the dissent claims that in passing the Identity Theft Penalty Enhancement Act, Congress's "central concern [was] the damage caused by the wrongful use of another person's identity." Dissenting Op. at 1254 n.9. That purpose, it goes without saying, differs from the one that animated section 1546(a) —a statute Congress first passed in its current form in 1948, long before "identity theft" entered the criminal lexicon or captured Congress's attention a half-century later. *See United States v. Campos-Serrano*, 430 F.2d 173, 175 (7th Cir. 1970) (recounting the legislative history of 18 U.S.C. § 1546); *see also* Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998) (amending 18 U.S.C. § 1028 to include a section on identity theft).

Of greater relevance to this case is a related canon of statutory construction: the "general principle . . . that when 'Congress includes particular language *in one section of a statute but omits it in another section of the same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Sigmon Coal*, 534 U.S. at 452, 122 S. Ct. 941 (emphasis added) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)). As we noted above, *see supra* at 1239-40, subsection 1028A(a)(2)—the terrorism offense provision—makes it a crime knowingly to use "a means of identification of another person *or a false identification document*," *id.* (emphasis added), while subsection (a)(1)—the general offense provision—never mentions "false identification document[s]." Had Congress parroted subsection (a)(2)'s "false identification document" lan-

guage in subsection (a)(1), Villanueva-Sotelo's guilt would be plain. But Congress omitted that language for the two-year "general" offense enhancement while including it for the five-year "terrorism offense" enhancement—a decision that makes eminent sense given Congress's heightened concern with the terrorist threat facing our country. *See* H.R. Rep. No. 108-528, at 4, 2004 U.S.C.C.A.N. at 786 (explaining that "terrorist organizations increasingly turn to stolen identities to hide themselves from law enforcement"). We see no reason to read subsection (a)(2)'s language into subsection (a)(1) when Congress clearly could have placed it there itself.

After concluding that "dueling canons of statutory construction" might fail to resolve the statute's inherent ambiguity, the dissent appeals to "common sense" as an interpretive aide. Dissenting Op. at 1257. First off, there is no duel: as we just explained, the canon the dissent cites is either inapplicable or supports our interpretation. More to the point, although common sense certainly plays a role in statutory construction, common sense does not excuse us from engaging in the thorny task of determining what Congress intended when it passed a statute. And here, in any event, to return once more to Judge Friedman's hypothetical, common sense tells us that a defendant ought not receive two additional years of incarceration for picking one random number rather than another—unless, of course, Congress has made clear that he should. Put another way, it's only common sense to conclude that conviction under an identity theft statute requires actual theft.

Finally, reproducing a troubling news report from 2006—which was not before Congress when it passed

the Identity Theft Penalty Enhancement Act two years earlier—showing how one victim's social security number was used by eighty-one different people across the country, *see* Dissenting Op. at 1255-56 n.11, the dissent wonders if Congress really could have intended to punish those individuals who knew they had stolen a real person's number more severely than those who did not. The short answer to that question is yes. We see nothing unfathomable about Congress singling out certain morally culpable conduct for enhanced punishment, and section 1028A(a)(1)'s text, title, and legislative history reveal that Congress did precisely that. And again, even if the dissent's reading is plausible, it is hardly inescapable—which leads us back to the rule of lenity. When and if Congress considers cases like the one described in the 2006 news article, it may well decide to extend the "[a]ggravated identity theft" statute's reach, or to enhance the penalty still further. But that's a decision for Congress, not this court.

V.

Two final points. First, we doubt that our interpretation of section 1028A(a)(1) will saddle the government with a burden it cannot meet. In each of the examples Congress cited, *see supra* at 1244-45—as in most run-of-the-mill identity theft cases—proving the defendant knew the stolen identification belonged to another person should present no major obstacle, as such knowledge will often be demonstrated by the circumstances of the case. For instance, when an individual obtains personal information by trolling through the victim's garbage or by improperly viewing files to which the perpetrator gains access, he obviously knows the information belongs to someone else. And when an identity thief estab-

lishes credit, conducts transactions, or secures benefits in the victim's name, the crime would make little sense if the information at issue belonged to no one. In that sense, this case differs from *Chin*, in which we found it "implausible that Congress would have placed on the prosecution the often impossible burden of proving, beyond a reasonable doubt, that a defendant knew the youth he enticed was under eighteen." *Chin*, 981 F.2d at 1280. And if experience proves our prediction wrong and the burden too onerous, the government is free to ask Congress to limit the statute's knowledge requirement.

Second, as noted above, our interpretation does not mean that Villanueva-Sotelo escapes punishment for his crime, for he pled guilty to violating 18 U.S.C. § 1546(a), which provides: "Whoever knowingly . . . uses, attempts to use, possesses, obtains, accepts, or receives . . . [an] alien registration receipt card . . . knowing it to be forged . . . [s]hall be fined under this title or imprisoned." Unlike section 1028A(a)(1), that statute unambiguously criminalizes Villanueva-Sotelo's conduct. We affirm.

So ordered.

KAREN LECRAFT HENDERSON Circuit Judge, dissenting:

At issue in this case is the proper interpretation of the following language of the Identity Theft Penalty Enhancement Act, Pub. L. 108-275, § 2(a), 118 Stat. 831 (ITPEA):

> Whoever, during and in relation to any felony violation enumerated in subsection (c), *knowingly* transfers, possesses, or uses, without lawful authority, a

> means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1) (emphasis added).[1] The majority interprets this language to require that the Government prove that the defendant knew "the 'means of identification' he 'transfer[red], possesse[d], or use[d]' actually belonged to 'another person[.]'" Maj. Op. at 1236 (quoting 18 U.S.C. § 1028A(a)(1) (alterations in majority opinion). Because I believe them majority misreads this language, I respectfully dissent.

I.

The facts are not in dispute. Appellee Villanueva-Sotelo is a Mexican national who has entered the United States illegally at least three times and twice been returned to Mexico.[2] On August 5, 2006, he was arrested and charged with, *inter alia*, aggravated identity theft under section 1028A(a)(1) after he presented a false Per-

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[1] Among the felony violations enumerated in subsection (c) is any violation of "chapter 75 (relating to passports and visas)." 18 U.S.C. § 1028A(c)(7). Villanueva-Sotelo pleaded guilty to violating subsection (7). *See infra* pp. 1256-57.

[2] On June 15, 1990, Villanueva-Sotelo was arrested in Oroville, Washington for shoplifting. He pleaded guilty to misdemeanor theft and was sentenced to 10 days in jail. On July 3, 1990, a United States immigration judge ordered Villanueva-Sotelo's removal from the United States and he was deported to Mexico. *See* Factual Proffer in Support of Guilty Plea. Villanueva-Sotelo re-entered the United States and was again arrested in Washington State. He pleaded guilty to unauthorized reentry of a removed alien (8 U.S.C. § 1326), possession of false immigration documents (18 U.S.C. § 1546(a)) and possession of five or more false identification documents with intent to transfer (18 U.S.C. § 1028(a)(3)); he was sentenced to two months' incarceration. On September 23, 1991 he was again ordered deported to Mexico. *See id.*

manent Resident Card (Card)[3] to an officer of the Metropolitan Police Department (MPD) in the District of Columbia. *See* Indictment 2. Although the Card bore Villanueva-Sotelo's name and photograph, it contained a registration number assigned to another person. Villanueva-Sotelo admits knowing the Card was false; however, he contends that he did not know the registration number belonged to another person. For its part, the Government concedes that it cannot prove that Villanueva-Sotelo knew the number belonged to another person. *See* Gov't Br. 5.

On May 11, 2006, the Government charged Villanueva-Sotelo with unlawful re-entry of a removed alien (8 U.S.C. § 1326(a) and (b)(1)) (Count 1), possession of false immigration documents (18 U.S.C. § 1546(a)) (Count 2) and aggravated identity theft (18 U.S.C. § 1028A(a)(1)) (Count 3). Villanueva-Sotelo pleaded guilty to the first two counts but challenged the aggravated identity theft count, arguing that under section 1028A(a)(1) the Government was required to establish that he knew the Card he presented contained the registration number "of another person." The district court agreed and dismissed Count 3, the aggravated

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[3] Until 2003 the Card, commonly known as a "green card," was issued by the Immigration and Naturalization Service (INS) of the U.S. Department of Justice. Since 2003, when many INS functions were transferred to the newly-created Department of Homeland Security, the U.S. Citizenship and Immigration Service (USCIS) began issuing them. *See* 6 U.S.C. § 271(b); 8 U.S.C. § 1103. The Card includes, *inter alia*, the alien's name, photograph, date of birth, country of origin, expiration date, fingerprint and an alien registration number assigned to him by the USCIS. *See, e.g.*, 8 U.S.C. §§ 1201, 1202(a)-(b), 1304(d) (requirements for immigrant visas); 8 C.F.R. § 264.5 ("Application for creation of record of permanent residence").

identity theft count.[4] The Government then appealed and today the majority affirms the dismissal of Count 3.

II.

At least two sister circuits have interpreted section 1028A(a)(1)'s language as unambiguously *not* requiring that the defendant know that the false "means of identification" belongs to another. *United States v. Hurtado*, 508 F.3d 603, 610 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213, 217 (4th Cir.), *cert. denied*, —U.S.—, 127 S. Ct. 366, 166 L. Ed. 2d 138 (2006). A third circuit has followed the Fourth Circuit's rationale without additional analysis. *United States v. Hines*, 472 F.3d 1038, 1039-40 (8th Cir.), *cert. denied*, —U.S.—, 128 S. Ct. 235, 169 L. Ed. 2d 170 (2007). The majority's interpretation therefore causes a disfavored circuit split. *See United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1201 (D.C. Cir.) ("[W]e avoid creating circuit splits when possible . . . ."), *cert. denied*, 546 U.S. 960, 126 S. Ct. 478, 163 L. Ed. 2d 363 (2005).[5] Its disagreement

[4] The district court thereby disagreed with the earlier decision of another district judge that section 1028A(a)(1) does *not* require the Government to prove that "the identification numbers on the fraudulent documents belonged to an actual person." *United States v. Contreras-Macedas*, 437 F. Supp. 2d 69, 76 (D.D.C. 2006).

[5] At the district court level there is also disagreement. The District of Maine first concluded that section 1028A(a)(1)'s mens rea requirement applies to "of another person" (by submitting to the jury the question whether the defendant knew her false means of identification belonged to someone else), *United States v. Godin*, 476 F. Supp. 2d 1, 3 (D. Me. 2007); it then reversed field and adopted the Fourth Circuit's rationale. *United States v. Godin*, 489 F. Supp. 2d 118, 119 (D. Me. 2007). Other district courts have reached different conclusions. *Compare United States v. Beachem*, 399 F. Supp. 2d 1156, 1158 (W.D. Wa. 2005) (§ 1028A(a)(1)'s knowledge requirement applies to each element), *and United States v. Salazar-Montero*, No. CR 07-2020, 2007 WL

with the other circuits is two-fold: it first finds the language ambiguous, *see* Maj. Op. at 1237-43; it then construes the ambiguity in the defendant's favor. Maj. Op. at 1246-47. Even if the Fourth, Eighth and Eleventh Circuits incorrectly view the language as unambiguous,[6] I nonetheless agree with their reading of the language that the Government need not establish the defendant

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3102096, at * 13 (N.D. Iowa Oct. 25, 2007) (same), *with United States v. Montejo*, 353 F.Supp.2d 643, 654 (E.D. Va. 2005) (§ 1028A(a)(1)'s knowledge requirement does not modify "of another person"), *and United States v. Contreras-Macedas*, 437 F. Supp. 2d 69, 79 (D.D.C. 2006) (same).

[6] The decisions of the Supreme Court as well as of our Circuit have held that similarly worded criminal statutes-i.e., statutes containing the word "knowingly" followed by a verb or series of verbs, a direct object and at least one prepositional phrase describing that object-are ambiguous. *See Liparota v. United States*, 471 U.S. 419, 424, 425 n.7, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985) ("Either interpretation would accord with ordinary usage. 'As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word 'knowingly' is intended to travel . . . .'" (quoting W. LaFave & A. Scott, Criminal Law § 27 (1972)); *United States v. Chin*, 981 F.2d 1275, 1279 (D.C. Cir. 1992) (finding similarly structured criminal statute ambiguous: "One cannot tell from the words alone whether the person's juvenile status must be known . . . ."), *cert. denied*, 508 U.S. 923, 113 S. Ct. 2377, 124 L. Ed. 2d 281 (1993); *United States v. Nofziger*, 878 F.2d 442, 447 (D.C. Cir. 1989) (finding similarly structured criminal statute " 'is ambiguous. The statute can be read either way.' " (quoting *United States v. O'Brien*, 686 F.2d 850, 852 (10th Cir. 1982)); *cf. Arthur Andersen LLP v. United States*, 544 U.S. 696, 705, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005) ("We have recognized with regard to similar statutory language that the mens rea at least applies to the acts that immediately follow, if not to other elements down the statutory chain."); *see also McCreary v. Offner*, 172 F.3d 76, 82-83 (D.C. Cir. 1999) (noting other circuits' differing interpretations of statute manifest statute is ambiguous).

knew the false means of identification is that "of another person."

Because the majority views the provision as ambiguous, it looks beyond the words to discern their meaning. It then concludes that " 'the statutory structure, relevant legislative history, [and] congressional purposes expressed in the [statute]'" all support applying the knowledge requirement to every element of section 1028A(a)(1). Maj. Op. at 1242-43 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)) (alterations in majority opinion). It first places great emphasis on the word "theft" in the ITPEA's title. Apparently the majority believes that Villanueva-Sotelo's conduct does not constitute aggravated identity theft because his "accidental misappropriation," Maj. Op. at 1246, of another's identification number—the "accident," I assume, relating to his ignorance of the fact that the identification he *knows* to be false is assigned to another person—would not constitute "theft." *See* Maj. Op. at 1243 ("As th[e] title demonstrates, the statute concerns 'theft,' i.e., 'the felonious taking and removing of personal property *with intent to deprive the rightful owner of it.*'" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2369 (1993) (emphasis added); *see also* BLACK'S LAW DICTIONARY 1516 (8th ed. 2004) ('The felonious taking and removing of another's personal property with the intent of depriving the true owner of it.'). According to the majority, the fact that the title uses the word "theft" shows that the Congress intended "to single out thieves in the traditional sense of the word." *Id.* But determining the mens rea required to commit a federal offense does not necessarily entail finding a "common-law" match. Instead it involves the "'construction of the statute and

. . . inference of the intent of Congress.'" *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (quoting *United States v. Balint*, 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604 (1922)) (ellipsis in original); *see also Liparota*, 471 U.S. 419, 424, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 3 L. Ed. 259 (1812)). Here the Congress has made clear—in discussing the same title the majority reads as limited to common-law theft—that identity "theft" is a much broader offense than the majority prefers. The House Judiciary Committee Report accompanying the ITPEA explains that "the terms 'identity *theft*' and 'identity fraud' refer to *all types of crimes* in which someone *wrongfully obtains* and uses another person's personal data *in some way that involves fraud or deception*, typically for economic or other gain, including immigration benefits." H.R. Rep. No. 108-528, at 4, 2004 U.S.C.C.A.N. at 780 (2004) (emphases added) (House Report); *see also id.* at 25 (statement of Rep. Coble) ("Identity theft and identity fraud are terms used to refer to *all types of crimes in which an individual's personal or financial data is misused*, typically for economic gain or to facilitate another criminal activity." (emphasis added)). The Congress's synonymizing "identity theft" and "identity fraud"—followed by a definition that includes "all types" of crime "that involve[ ] fraud or deception"—could not

make clearer that identity "theft" is meant to be read generically.[7]

The majority dismisses the House Report's discussion of the breadth of "identity theft" by positing that the Congress did not consider "imagin[ing] a string of random numbers" to be a "*wrongful*[ ]" way of possessing and/or using another person's "means of identification." *See* Maj. Op. at 1244 (emphasis added). To support this notion, the majority points to a section of the House Report that includes several examples of techniques commonly used in identity theft (e.g., "'dumpster diving,'" "'hack[ing] into computers,' " and "'steal[ing] paperwork likely to contain personal information,'" *id.* (quoting H.R. Rep. No. 108-528, at 4-5,

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[7] Even assuming *arguendo* that we were required to harmonize aggravated identity theft with common-law theft, could not the majority's view be inconsistent with the common law? *See* Maj. Op. at 1243 (defining "theft" as "'the felonious *taking and removing* of personal property with intent to deprive the rightful owner of it' ") (emphasis added) (internal quotations omitted). In the majority's view, a defendant could be guilty of aggravated identity theft despite not having "take[en]" or "remov[ed]" another's "personal property" so long as he knows the false identification belongs to another. Nor does the identity thief "deprive" the owner of the latter's means of identification—if anything, he "shares" the owner's identity.

Moreover, depending on the context, "theft" often has a broader meaning than the common-law definition. *See, e.g.*, *Montejo*, 353 F. Supp. 2d at 654 ("While 'theft' is a popular term often identified with 'larceny,' the word 'theft' [can also be] an umbrella term which includes other forms of wrongful taking."(quoting *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 970 n.18 (S.D. Miss. 1995))); WEBSTER'S THIRD NEW WORLD DICTIONARY 2369 (including, in addition to the common-law definition of "theft"—which the majority cites—, "taking of property unlawfully"); BLACK'S LAW DICTIONARY 1486 (7th ed. 1999) (noting that theft, in addition to its common-law definition, can also mean "[b]roadly, any act or instance of stealing.")

2004 U.S.C.C.A.N. at 780-781)) and lists "a string of cases in which convicted identity thieves escaped with relatively light sentences, all of which involved defendants who, unlike Villanueva-Sotelo, knew the identification they used belonged to another." *Id.* Finally, the majority highlights two statements from the floor debate to the same effect. *Id.* at 1244 (quoting 150 Cong. Rec. H4809 (daily ed. June 23, 2004) (statement of Rep Sensenbrenner) (noting that "identity thieves" "sometimes [steal] hundreds or even thousands of identities"); *id.* at H4810 (statement of Rep. Carter) (noting case wherein "Texas driver's license bureau clerk pleaded guilty to selling ID cards to illegal immigrants using stolen information from immigration papers")). To make the strongest argument for the enactment of the ITPEA, however, the drafters of the House Report understandably highlighted the most notorious cases in which defendants had received "light" punishment under the then-existing law. That a crime like Villanueva-Sotelo's—i.e., the knowing use of an false identification without also knowing the false identification belongs to another person—did not make the "worst case" list does not mean that Villanueva-Sotelo's conduct is not covered by section 1028A(a)(1).[8]

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[8] Indeed, the House Report fails to mention other common forms of identity theft, e.g., a parent misappropriating a child's identity, *see e.g.*, John Leland, *Identity Thief Is Often Found in Family Photo*, N.Y. TIMES, Nov. 13, 2006, at A 1 (describing parent-child identity fraud as commonplace).

Indeed, I read the House Report to expressly manifest that the Congress *did* consider Villanueva-Sotelo's conduct covered. A primary purpose of the statute was to increase the punishment for a defendant who "wrongfully obtains and uses *another person's* personal data," H.R. Rep. No 108-528 at 4, 2004 U.S.C.C.A.N. at 780 (emphasis added), so that the punishment more closely fits the harm the crime causes its victim.[9] In

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[9] *See* 150 Cong. Rec. H4811 (statement of Rep. Schiff) ("A victim of identity theft usually spends a year and a half working to restore his or her identity and good name. . . . The current sentencing structure and practice is flawed because it does not reflect the impact on the victim, in addition to the impact and loss to the financial institution."). The Congress's central concern with the damage caused by the wrongful use of another person's identity rings throughout the legislative history. *See, e.g.*, H.R. Rep. No. 108-528, at 4, 2004 U.S.C.C.A.N. at 780 ("[T]he loss to businesses and financial institutions from identity theft [is estimated] to be $47.6 billion. The costs to individual consumers are estimated to be approximately $5.0 billion."); *id.* at 25 (statement of Rep. Coble) ("In 2002, the FTC received 161,819 victim complaints of compromised personal information. . . . [These] victims have a difficult time consuming [sic] an expensive task of repairing a damaged credit history as well as their respective reputations."); *id.* at 35 (statement of Rep. Scott) ("[T]he FTC reports [consumer identity theft] bilked almost 30 million Americans out of approximately $50 billion over the last 5 years, with about $5 billion of that out-of-pocket, unrecovered losses to consumers."); *id.* at 44 ("Identity theft victims now spend an average of 600 hours—often over a period of years—recovering from the crime. Being a victim costs an average of $1,400 in out-of-pocket expenses . . . ."); *id.* at 51 (statement of Rep. Schiff) (noting that purpose of ITPEA is "to protect the good credit and reputation of hard-working Americans").

The Congress also enacted the ITPEA in order to increase the penalty for a terrorist who possesses a false means of identification. *See* 18 U.S.C. § 1028A(a)(2) (mandating five-year consecutive prison term for "knowingly transfer[ing], possess[ing] or us[ing], without lawful authority, a means of identification of another person or a false

concluding that the examples of "identity theft" included in the House Report exhaustively describe the types of "wrongful" behavior the Congress intended to sanction, the majority has lost sight of the Congress's primary objective—stopping the nation-wide identity theft tidal wave by upping the ante for the thief. It is preposterous to think the same Congress that so plainly and firmly intended to increase the penalty—"a mandatory consecutive penalty enhancement of 2 years"—if the defendant possesses another's means of identification "in order to commit a serious federal predicate offense," *id.* at 10, 2004 U.S.C.C.A.N. at 785, would then so limit its imposition as to require the Government to prove that the defendant *knows* he wrongfully possesses the identity "of another person."[10] In this respect, the majority ignores reality in "doubt[ing] that [its] interpretation of section 1028A(a)(1) will saddle the government with a burden it cannot meet." Maj. Op. at 1249. Except for the forger himself, proving beyond a reasonable doubt that each of the thousands, if not millions, of holders of false green cards knows that the false means of identification he possesses is that "of another person" would "place[] on

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identification document" "during and in relation to any felony violation enumerated in section 2332b(g)(5)(B)" (i.e., a terrorism offense)); H.R. Rep. No 108-528, at 3, 2004 U.S.C.C.A.N. at 779 ("The bill also amends current law to impose a higher maximum penalty for identity theft used to facilitate acts of terrorism."); *id.* at 4, 2004 U.S.C.C.A.N. at 780 ("[A]l Qaida and other terrorist organizations increasingly turn to stolen identities to hide themselves from law enforcement."). Significantly, the five-year consecutive sentence is to be imposed whether or not the false identification is that "of another person," manifesting that scienter "of another person" is not required.

[10] Must the government also prove the defendant knows "another person['s]" *identity*? I assume even the majority would not offer that reading.

the prosecution [an] often impossible burden." *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992), *cert. denied*, 508 U.S. 923, 113 S. Ct. 2377, 124 L. Ed. 2d 281 (1993). The legislative history persuades me that the Congress considered the unauthorized use of another person's means of identification to be "wrongful" and therefore covered by section 1028A(a)(1) whether done by "dumpster diving," "hacking into a computer system" or "imagining a string of numbers."[11]

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[11] I note just one example of a result that can fit within the majority's seemingly benign "accidental misappropriation" label, Maj. Op. at 1246:

> One woman's Social Security identification number has been used by at least 81 people in 17 states. . . . [I]nformation gleaned from criminal investigations, tax documents and other sources suggest most of the users were probably illegal immigrants trying to get work.
>
> Audra Schmierer, a 33-year-old housewife in this affluent San Francisco suburb, realized she had a problem in February 2005, when she got a statement from the IRS saying she owed $15,813 in back taxes—even though she had not worked since her son was born in 2000. Perhaps even more surprising, the taxes were due from jobs in Texas.
>
> Schmierer has since found that her Social Security number has been used by people from Florida to Washington state, at construction sites, fast-food restaurants and even major high-tech companies. Some opened bank accounts using the number.
>
> * * *
>
> Under current law, if the Social Security Administration or the Internal Revenue Service find multiple people using the same Social Security number, the agencies send letters informing employers of possible errors.

The IRS can fine employers $50 for each inaccurate number filed, a punishment that companies often dismiss as just another cost of doing business.

"Sending letters is the limit to what can be done," Social Security spokesman Lowell Kepke said. "We expect that will be able to fix any records that are incorrect."

The information on mismatched names is seldom shared with law enforcement agencies.

* * *

Schmierer has done a little investigating of her own, combing through tax bills sent to her for names and locations of employers who hired people using her number.

She has also obtained more than 200 W-2 and 1099 tax forms that contained her Social Security number but different names.

* * *

Schmierer filed a police report after learning one man had used her information in 2003 at janitorial and landscaping companies near Haltom City, Texas.

Investigators found the man, who told officers he had bought a fake Social Security card at a flea market, according to a police report. He was not arrested.

* * *

What started as a hassle turned into a major headache earlier this year when she sought work through a temporary agency that learned her Social Security number had been used by a woman in Texas two years earlier. The agency could not hire Schmierer for more than a month while the situation was clarified.

"How do you prove that you are you?" Schmierer said. "It's like you are guilty until proven innocent."

While returning from a trip to Mexico with her husband last year, Schmierer was detained for four hours in a Dallas airport by immigration officials. The reason: a woman using her Social Security number was wanted for a felony.

But resort to legislative history and congressional intent is not even necessary if the meaning of the language is discernible from a construction of the language under review together with language *in pari materia*. We have often held that if the Congress had intended language in legislation to have a certain disputed meaning, "it would have said so more clearly." *Bluewater Network v. E.P.A.*, 370 F.3d 1, 18 (D.C. Cir. 2004); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995); *Consumer Fed'n of Am. v. U.S. Dep't. of Health & Human Servs.*, 83 F.3d 1497, 1503 n.6 (D.C. Cir. 1996) ("[H]ad Congress [so] intended . . . , it presumably would have drafted the statute differently. . . ."). Here the Congress "could have drafted the statute to prohibit the knowing trans-

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* * *

> Schmierer's number became so compromised that Social Security officials finally took a rare step used only in extreme cases: They gave her a new one.

Peter Prengaman, *One Social Security Number, 81 People*, CBS NEWS, June 17, 2006, *available at* http:// www.cbsnews.com/stories/2006/06/17/national/main1726397.shtml?source=RSS&attr=HOME_1726397.

Whether the people who had these cards had obtained Schmeier's social security number through "dumpster diving," "hacking into a computer system" or simply "imagining a string of numbers," the harm Schmierer suffers is the same. Can the Congress really have intended to prevent the repetition of nightmares like Schmierer's by punishing more severely only that thief (from among the 81) who knows that the purloined social security number is a real one?

The majority points out the obvious fact that this news report postdates by some two years the enactment of the ITPEA. Maj. Op. at 1249. I highlight it, of course, not as legislative history but as an example of what the majority's oxymoronic "accidental misappropriation" interpretation will work.

fer, possession, or use, without lawful authority, of the means of identification 'known to belong to another actual person.'" *United States v. Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007). This is precisely what the Congress did in 18 U.S.C. § 1546(a)—the predicate offense Villanueva-Sotelo pleaded guilty to in Count 2, triggering the enhanced penalty of section 1028A(a)(1). Section 1546(a) makes it illegal to:

> utter[ ], use[ ], attempt[ ] to use, possess[ ], obtain[ ], accept[ ], or receive[ ] any [forged, counterfeited, altered or falsely made] . . . document prescribed by statute or regulation . . . as evidence of authorized stay or employment in the United States, *knowing it to be forged, counterfeited, altered, or falsely made*, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained.

18 U.S.C. § 1546(a) (emphasis added). By this language the Congress plainly intended that Villanueva-Sotelo *know* that the Card he presented to the MPD officer was forged, counterfeited, altered or falsely made. The fact that the Congress chose not to use the same language in section 1028A(a)(1)—a provision whose enhancement expressly incorporates 18 U.S.C. § 1546(a) (with its differing language) and which therefore must be given a construction *in pari materia*[12] persuades me that it did

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[12] "Statutory provisions *in pari materia* normally are construed together to discern their meaning." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S. Ct. 477, 34 L. Ed. 2d 446 (1972)).

To be in pari materia, statutes need *not* have been enacted simultaneously or refer to one another. . . . However, the rule that statutes in pari materia should be construed together has the greatest probative

not intend to require Villanueva-Sotelo to know that the Card he presented was that "of another person" in order to violate section 1028A(a)(1). If it *had* so intended, it would have phrased section 1028A(a)(1) as explicitly as it did section 1546(a); for example, "a means of identification known to belong to another person."[13] The fact that Villanueva-Sotelo is, in my view, guilty of both Count 2 (which he admits) and Count 3 (of which he professes his innocence) based on the *same* mens rea does not mean the charges are duplicative. Villanueva-Sotelo

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force . . . or *in the case where the later of two or more statutes relating to the same subject matter refers to the earlier.* In these situations the probability that acts relating to the same subject matter were based on the same policy is very high.

2B SUTHERLAND STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000) (emphases added) (footnotes omitted); *see, e.g., Estate of Headrick v. Comm'n*, 918 F.2d 1263, 1266 (6th Cir. 1990) (tax statutes "'specifically cross referenc[ing]' " each other construed *in pari materia*) (quoting *Estate of Leder v. Comm'n*, 893 F.2d 237, 241 (10th Cir. 1989)); *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir.1995) ("explicit cross reference" supported construing U.S.S.G. § 5C1.2 and Fed. R. Crim. P. 32(c) *in pari materia*); *Minkon v. Ford*, 66 N.J. 426, 332 A.2d 199, 203 (1975) ("[T]he rule most obviously applies . . . . where [the statutes in question] make specific reference to one another . . . .") (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.03 (Sands ed. 1973)); *Keith v. Lockhart*, 171 N.C. 451, 88 S.E. 640, 642 (1916) (construing two statutes *in pari materia* when "the later statute . . . in express terms refers to . . . the former). Because Section 1028A(c)(7) expressly incorporates by reference section 1546(a) and because both sections, as well as section 1028A(a)(1), relate to the same subject matter (possession of a false means of identification), they are to be construed *in pari materia*.

[13] *See, e.g.*, 18 U.S.C. § 922(q)(2)(A) ("It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at *a place that the individual knows*, or has reasonable cause to believe, *is a school zone*.") (emphases added).

can commit the predicate offense set out in section 1546(a) whether or not the false means of identification belongs to another; if it *does* belong to another, that is, if it fits the *description* set out in section 1028A(a)(1), Villanueva-Sotelo has also committed the "aggravated" offense and thereby added a mandatory two-years' consecutive imprisonment to his punishment.

Moreover, a comparison of sections 1028A(a)(1) and 1028A(a)(2) also demonstrates that the Congress did not intend "knowingly" to modify "of another person." Subsection (a)(2) provides for a five-year penalty enhancement for anyone who "during and in relation to" a terrorist act (per 18 U.S.C. § 2332b(g)(5)(B)):

> knowingly transfers, possesses, or uses, without lawful authority, [1] a means of identification of another person or [2] *a false identification document*. . . .

18 U.S.C. § 1028A(a)(2) (emphasis added). The second prong of this subsection demonstrates the Congress's intent that a terrorist's knowledge that he possesses a "false" identification document supplies all the culpability necessary to commit aggravated identity theft. Thus, when subsection (a)(1) uses the identical phrase in speaking of one who "knowingly . . . possesses . . ., without lawful authority, a means of identification of another person," the scienter requirement is satisfied if the defendant knows that he possesses "a means of identification" "without lawful authority." The phrase "of another person" is, in effect, jurisdictional language

describing the "means of identification" that triggers an additional penalty.[14]

Both the majority and I spill a lot of ink on dueling canons of statutory construction. *See supra* pp. 1256-58; Maj. Op at 1237-40, 1247-49. Perhaps our exchange illustrates little more than that, in construing statutes, courts have a variety of interpretive aids to choose from. The *first* principle of statutory construction, however, is to apply common sense in the reading of language. *See United States v. Howell*, 11 Wall. 432, 78 U.S. 432, 436, 20 L. Ed. 195 (1870) ("[O]ne of the first canons of construction teaches us to avoid if possible [a result] which is at war with the common sense. . . ."); *Roschen v. Ward*, 279 U.S. 337, 339, 49 S. Ct. 336, 73 L. Ed. 722 (1929) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean."); *Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000). Common sense tells me that the Congress, seeking to stop a type of crime that is increasing on an almost daily basis, enhanced the penalty to effect its purpose. And it is anything but common sense to conclude that the same Congress intended to gut that enhanced penalty, as the majority's reading does.

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[14] Construing 1028A(a)(1) and 1028A(a)(2) together also reveals that the majority's emphasis on the word "theft" in the ITPEA's title is misplaced. Under the second prong of section 1028A(a)(2) a defendant can be convicted of aggravated identity theft despite the fact that he has not misappropriated-accidently or otherwise-another person's identity. That the knowing possession of "a false identification document" suffices to violate section 1028A(a)(2) makes clear that the Congress intended identity "theft" to be construed broadly—in some instances not even requiring the "traditional" theft the majority describes.

Finally, I believe the majority misinterprets Supreme Court precedent. That precedent teaches that "[t]he presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 256-57, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)) (first emphasis added). For example, in *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084, 85 L. 2d 434 (1985), the Supreme Court interpreted the mens rea requirement of a statute which prohibited "knowingly us[ing], transfer[ing], acquir[ing], alter[ing], or possess[ing] [food] coupons," 7 U.S.C. § 2024(b)(1), "in any manner not authorized by statute or regulations." *Liparota*, 471 U.S. at 426, 105 S. Ct. 2084. At issue was whether the "knowledge" requirement applied to each element of the offense—i.e., whether the defendant was required to know that he was using food stamps "in a manner not authorized by statute or regulations." *Liparota*, 471 U.S. at 426, 105 S. Ct. 2084. The Court found the language of the food stamp statute ambiguous and noted that the legislative history did not clarify the scope of the mens rea requirement. *See id.* at 424-25, 105 S. Ct. 2084. The Court ultimately held that the "knowledge" requirement applied to each element of the offense, emphasizing its desire to avoid "criminaliz[ing] a broad

range of apparently innocent conduct."[15] *Id.* at 426, 105 S. Ct. 2084.

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), the Supreme Court expressed the same concern in interpreting a statute which criminalized "knowingly" transporting, shipping, receiving, distributing or reproducing sexually

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[15] The Court explained:

> [The statute] declares it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. The statute provides further that "[c]oupons issued to eligible households shall be used by them only to purchase food in retail food stores which have been approved for participation in the food stamp program *at prices prevailing in such stores.*" 7 U.S.C. § 2016(b) . . . This seems to be the *only* authorized use. A strict reading of the statute with no knowledge-of-illegality requirement would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the mail due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away. Of course, Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation.

Liparota, 471 U.S. at 426 27, 105 S. Ct. 2084 (emphases and alterations in original) (citations and footnote omitted).

explicit material involving minors.[16] The Court believed that under the "most grammatical reading of the statute," *id.* at 70, 115 S.Ct. 464, "knowingly" would modify only the immediately surrounding verbs (i.e., "transports or ships"). This construction, however, would allow conviction even if the defendant was not aware that the materials were sexually explicit or that the actors were minors. *Id.* at 68, 115 S. Ct. 464. The Court chose not to give the "most natural," *id.*, reading of the statute, instead extending the mens rea requirement to each element of the offense. It explained that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 72, 115 S. Ct. 464 (discussing *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952) and *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)). Otherwise:

> a retail druggist who returns an uninspected roll of developed film to a customer "knowingly distributes" a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. Or, a new resident of an apartment might receive mail for the prior resident and store the mail unopened. If the prior tenant had requested delivery of [explicit] materials . . . his residential successor

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[16] The statute allowed criminal charges to be brought against any person who "knowingly transports or ships in interstate or foreign commerce . . . any visual depiction, if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a).

> could be prosecuted for "knowing receipt" of such materials.
>
> Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be "film" "knowingly transports" such film. We do not assume that Congress, in passing laws, intended such results.

Id. at 69-70, 115 S. Ct. 464. The Court characterized this result as "not merely odd, but positively absurd." *Id.* at 69, 115 S. Ct. 464.[17]

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[17] Until today, our decisions have been to the same effect. For example, in *United States v. Chin*, 981 F.2d 1275 (D.C. Cir. 1992), *cert. denied*, 508 U.S. 923, 113 S. Ct. 2377, 124 L. Ed. 2d 281 (1993), we held that under 21 U.S.C. § 861(a)(2)—which prohibits anyone who illegally distributes a controlled substance from "knowingly and intentionally . . . employ[ing] . . . a person under eighteen years of age to assist"—the Government need not prove the defendant knew his accomplice was under eighteen. We noted that "this is not an instance in which a broad interpretation of a statute threatens to criminalize 'apparently innocent conduct.'" *Id.* at 1280 (quoting *Liparota*, 471 U.S. at 426, 105 S. Ct. 2084). We explained that "[a] conviction under 21 U.S.C. § 861(a)(2) can be had only upon proof that the person knowingly and intentionally" used another person to distribute controlled substances. *Id.* Because the distribution of narcotics is hardly an innocent act, we held that the Government was not required to prove that the defendant knew his accomplice was under eighteen. *Cf. United States v. Williams*, 922 F.2d 737, 738-39 (11th Cir.) (interpreting same subsection and concluding Government need not prove defendant knew minor's age), *cert. denied*, 502 U.S. 892, 112 S. Ct. 258, 116 L. Ed. 2d 212 (1991); *United States v. Valencia-Roldan*, 893 F.2d 1080, 1083 (9th Cir.) (same), *cert. denied*, 495 U.S. 935, 110 S. Ct. 2181, 109 L. Ed. 2d 509 (1990); *United States v. Carter*, 854 F.2d 1102, 1108-09 (8th Cir.1988) (same). In *United States v. Holland*, 810 F.2d 1215, 1223-24 (D.C. Cir.), *cert. denied*, 481 U.S. 1057, 107 S. Ct. 2199, 95 L. Ed. 2d 854 (1987); we held that under 21 U.S.C. § 845a (recodified as 21 U.S.C. § 860)—which

There is no similar danger that innocent or unwitting conduct might be penalized under section 1028A(a)(1) because a conviction can be had *only* if the defendant has used another person's means of identification during or in relation to one of the felony offenses enumerated in section 1028A(c).[18] Section 1028A(a)(1) functions as any "other federal law[ ] which provide[s] enhanced penalties or allow[s] conviction for obviously antisocial conduct upon proof of a fact of which defendant need not be aware.'" *United States v. Montejo*, 442 F.3d 213, 216-17 (4th Cir. 2006) (quoting *United States v. Cook*, 76 F.3d 596, 601 (4th Cir. 1996)); *see, e.g., United States v. Feola*, 420 U.S. 671, 684, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975) (upholding penalty enhancement under 18 U.S.C. § 111 for any person who assaults federal officer whether or not he knows victim is, in fact, federal officer);[19] *see also*

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prohibited the sale of controlled substances within 1000 feet of a elementary or secondary school—the Government need not prove that the defendant knew that a school was within 1000 feet because such reading was not necessary to avoid "criminaliz[ing] a broad range of apparently innocent conduct.'" *Id.* at 1223.

[18] As noted earlier, Villanueva-Sotelo admitted knowing the Card he possessed was false and that his possession of the Card was illegal, *see* Factual Proffer 3, unlike the *Liparota* defendant who professed his ignorance of any unlawful conduct.

[19] The *Feola* Court reasoned that:

> [its] interpretation [of § 111] poses no risk of unfairness to defendants. It is no snare for the unsuspecting. Although the perpetrator . . . may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual [victim]. . . . [T]he offender takes his victim as he finds him.

Feola, 420 U.S. at 685, 95 S. Ct. 1255.

United States v. LaPorta, 46 F.3d 152, 158 (2d Cir. 1994) (defendant not required to know torched building was government property because "[a]rson is hardly otherwise innocent conduct" (quotation omitted)); *United States v. Falu*, 776 F.2d 46, 50 (2d Cir. 1985) (Drug Free School Zone Act: "This construction . . . does not criminalize otherwise innocent activity"); *United States v. Hamilton*, 456 F.2d 171, 172-73 (3d Cir.) (in Mann Act prosecution, defendant not required to know minor transported across state line for immoral purpose was under eighteen; "knowingly" held to refer only to act of transportation), *cert. denied*, 406 U.S. 947, 92 S. Ct. 2051, 32 L. Ed. 2d 335 (1972). In these cases—where the defendant can "hardly be surprised to learn that [his behavior] is not an innocent act," *see United States v. Freed*, 401 U.S. 601, 609, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971)—the courts have made it the defendant's duty to "'ascertain[,] at his peril whether [his actions] come [ ] within the inhibition of the statute.'" *Id.* (quoting *United States v. Balint*, 258 U.S. 250, 253-54, 42 S. Ct. 301, 66 L. Ed. 604 (1922)). It is well settled that we must "presum[e] that Congress was aware of [the Court's] . . . judicial interpretations," *Keene Corp. v. United States*, 508 U.S. 200, 212, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993), including "[t]he presumption in favor of scienter [that] generally requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 257, 120 S. Ct. 2159 (quoting *X-Citement Video*, 513 U.S. at 72, 115 S. Ct. 464) (first emphasis added). Applying the presumption here, I cannot help but conclude that the Congress intended the violation of section 1028A(a)(1) to hinge on the defendant's knowing use of a means of identification

known to be false without his also having to know the false identification is that "of another person."

In sum, I would hold, as has every other circuit that has construed this language, *see United States v. Montejo*, 442 F.3d 213 (4th Cir.), *cert. denied*, __ U.S. __, 127 S. Ct. 366, 166 L. Ed. 2d 138 (2006); *United States v. Hines*, 472 F.3d 1038 (8th Cir.), cert. denied, __ U.S. __, 128 S. Ct. 235, 169 L. Ed. 2d 170 (2007); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007), that section 1028A(a)(1) of the ITPEA does not require the Government to prove that the defendant know that the false "means of identification" he possesses is that "of another person." 18 U.S.C. § 1028A(a)(1).[20] Accordingly, I would reverse the district court's dismissal of Count 3, charging Villanueva-Sotelo with a violation of 18 U.S.C. § 1028A(a)(1).

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[20] I believe the rule of lenity is inapplicable here, even if only as an alternative holding. *See* Maj. Op. at 1246-47. *See Chapman v. United States*, 500 U.S. 453, 463, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (rule of lenity "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' . . . such that even after a court has 'seize[d] everything from which aid can be derived,' it is still 'left with an ambiguous statute.' ") (quoting *Huddleston v. United States*, 415 U.S. 814, 831, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974); *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)). To the extent the relevant language is ambiguous, it is far from "grievously" so; legislative history and statutory language *in pari materia* clear it up nicely.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 07-3055

UNITED STATES OF AMERICA, APPELLANT

v.

GUSTAVO VILLANUEVA-SOTELO, APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 06cr00271-01)

Filed: Feb. 15, 2008

Before: HENDERSON and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause in hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

Date: February 15, 2008

Opinion for the court filed by Circuit Judge Tatel.
Dissenting opinion filed by Circuit Judge Henderson.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR-06-271 (PLF)

UNITED STATES OF AMERICA, PLAINTIFFS

v.

GUSTAVO VILLANUEVA-SOTELO, DEFENDANT

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE and a [*sic*]

Apr. 4, 2007
9:30 a.m.

APPEARANCES:

FOR THE PLAINTIFF:

United States Attorney's Office
By: FREDERICK W. YETTE, Esquire
AARON H. MEDELSOHN, Esquire
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Washington, D.C. 20001

FOR THE DEFENDANT:

By: STEVEN R. KIERSH, Esquire
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Washington, D.C. 20004

* * * * *

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THE COURT: As I understand where we are, it was a plea to the first two counts of the indictment. And with respect to the third count, there's a discrete legal question and Mr. Kiersh has moved to dismiss the third count. The government's filed an opposition; the defendant's filed a reply.

I have read all the cases that everybody cited. And if I grant the defense's motion, we'll then go on to sentencing. The defendant can appeal if he wants to, but the government will appeal on that issue.

* * * * *

[26]

THE COURT: All right. I'm going to try to give you an oral opinion, and that way we can move the case along. You can order a transcript from Ms. Russo. I think the transcript, obviously a written opinion would be a little more coherent, but I'll do the best I can. I do think a transcript will be useful in any event because this morning each side sort of made it's best case-for what obviously different courts have seen in different lights. And I think that you both very succinctly articulated the arguments.

Essentially, in this case when Mr. Villanueva-Sotelo [27] was arrested on Columbia Road on August 5, 2006, he had with him a permanent resident card which had his name and his photograph. It had a date of birth of January 17, 1971. It identified Mexico as his country of origin. It had an alien registration number on it. I think that the parties are in agreement that the defendant did not know that the alien registration number was assigned to another person, or who that person was. And it's also not clear whether he knew that the card had been stolen, although he apparently—there would be evidence at trial that he bought it from somebody.

Ultimately there was a three count indictment returned in this case. And the first count charged him with unlawful reentry of a removed alien, in violation of 18 United States Code, Section 1326(a) and (b)(1). The second count charged him with possession of a fraudulent document prescribed for authorized stay or employment in the United States, in violation of Title 18 United States Code, Section 1546(a), and that document was the permanent resident card. And that crime requires possession of a document, in this case a permanent resident card, knowing it to be forged, counterfeited, altered and falsely made. Mr. Villanueva-Sotelo has plead guilty to both of those two counts.

The third count is brought under a reasonably new statute which is entitled aggravated identity theft. And it's Title 18, United States Code, Section 1028A (a)(1). The statute [28] says, whoever, during, and in relation to any felony violation enumerated in Subsection C of that statute, knowingly transfers, possesses or uses without lawful authority a means of identification of another person shall, in addition to the punishment provided for

such felony, be sentenced to a term of imprisonment of two years.

In this case, Count Three alleges or charges that the defendant knowingly transferred, possessed, and used without lawful authority a means of identification of another person during and in relation to a felony offense relating to fraudulent and false documents, as specified in Count Two of this indictment. And such means of identification consisted of a false permanent resident card, including an alien registration number that is fully known by the grand jury and identified herein by its last three digits, which are 483, and that's identified for the last three digits for privacy reasons under the recently passed laws.

So in this case the underlying felony was what was set forth in Count Two, possession of the very same fraudulent document, the permanent resident card with the registration number. But we all understand, and the parties agree, that that's really just fortuitous that the statute 1028(a) in Subsection C, lists a whole series of predicate offenses. It doesn't have to be another fraudulent document offense, it doesn't have to be an immigration offense. It can be drugs, it [29] can be Social Security act violations, it could be making false statements in connection with obtaining a firearm, and it could be mail/bank wire fraud it could be all sorts of things.

And so one could, for example, conceive of an individual stopped on the street with drugs or selling drugs to an undercover officer, arrested for the drug offense, and in the course of the search a permanent resident card with a number on it not belonging to him could be found,

and that would be a consecutive sentence if the person were convicted of it.

In this case, because there are two lines of cases as to how to interpret 1028A(a)(1), the parties reached an agreement which makes a lot of sense, that the defendant agreed to plead guilty to the first two counts, and in doing so gets the benefit of the two level downward adjustment for accepting responsibility. But because there's a serious legal issue as to what 1028(a) means, the government was very good about agreeing to go forward with the plea to the first two counts so that this legal question could be litigated.

And if I agree with the government, we're going to have a bench trial or a trial on stipulated facts. There's not going to be any dispute about the facts. He'll undoubtedly be found guilty, based on what I've heard so far. And then I would have to sentence him two additional years, consecutive to whatever else I sentenced him to. And Mr. Villanueva-Sotelo [30] would appeal that, making the same arguments that were made this morning.

If, on the other hand, I dismiss Count Three of the indictment, the government will appeal to try to get a decision out of the D.C. Circuit on this very important statute and to try to persuade the D.C. Circuit, if I dismiss, that I'm wrong and that Judge Collyer was right.

The statute which I have read a minute or two ago, says that in order to be convicted of this offense, one must knowingly transfer, possess or use without lawful authority a means of identification of another person. The issue is whether the defendant not only had to knowingly transfer, possess or use, but whether he also

had to know that the alien registration number on the permanent registration card belonged to an actual person, as opposed to being a random collection of numbers under the scienter requirement of the statute.

The defendant argues that the term "knowingly" modifies not only the verbs "transfer, possess or use" that directly follow it, but also that "knowingly" modifies the phrase "a means of identification of another person." In other words, he argues that he had to know not only that he was in possession of the card, but that he had to know that the ID number on the card was that of another person.

The government argues that the term "knowingly" only modifies the verbs "transfer, posses or use," and that to prove [31] scienter or mens rea on the part of the defendant, at least this is their first argument, that that's all they must prove. They concede, as I think they must from the language of the statute, that they would have to separately prove that the identification belonged to another person, or was that of another person, or that the number was identified with another person, but not that the defendant knew that fact.

And so they have conceded today, as I understand it, that if Mr. Villanueva-Sotelo or someone in his position had just created a false document and picked numbers out of the air, that if those numbers could be hooked up to a real person who had a real resident alien card, that the government could prosecute and convict the person even though the defendant had no knowledge of that person or even that person's existence. But if a defendant picked numbers out of the air and they didn't link up to a real person, there could be no prosecution.

There are, as both sides pointed out, very few cases interpreting this statute because it's so new. There is the Montejo line of cases, and that's Judge Doumar's decision from the Eastern District of Virginia, 353 F. Supp. 2d 643. And Judge Doumar was affirmed by the Fourth Circuit in United States versus Montejo, 442 F.3d 213, Fourth Circuit, 2006. Judge Collyer agrees with Montajo, and she has set forth her views on this statute and ruled on this very question in United States versus Contreras-Macedas, 437 F. Supp. 2d 69, on June 20, [32] 2006.

The other line of cases is found primarily in United States versus Beachem, 399 F. Supp. 2d, 1156, Western District of Washington, 2005.

A question is whether or not the statute was intended to apply to situations where there was a theft of a card. And secondly, whether or not the Beachem reading of the statute as informed by reasoning of the Supreme Court, not with respect to this statute but with respect to language that the defense argues is quite similar in other statutes, cases of the Supreme Court, such as United States versus X, that's the letter, X-Citement video, 513 U.S. 64, and the Arthur Andersen case. And there's a third Supreme Court case. Arthur Andersen is Arthur Andersen versus United States, 125 Supreme Court 2129, May 31, 2005. The other is Liparota, v. United States 471 U. S. 419, which is a 1985 decision.

Under the government's theory, as I said, it would only have to prove that he knowingly possessed the card, and then separately prove that the ID, the identification, was that of another person, even though the defendant

did not know that it was that of another person, or whether the person was real or existed.

And, as I said, I believe that there is agreement between the parties that the evidence at trial would be that this defendant did not know there was another person, that [33] there was an actual person, even though the government could prove that there was in fact an actual person. And that the evidence would be that the defendant did not know that the card was stolen, even though there would be evidence that he bought the card from someone, and that that someone was not the person whose card it was.

The first argument is that the statute is clear, that it's not ambiguous. That's not entirely true if you look only at the language of the statute. One has to look at the fact that Congress—one has to do a grammatical analysis, what is the proper grammatical way to read the statute in order to get to the view of one side or the other.

But when one looks at two other factors Mr. Kiersh cites in support of his lack of ambiguity argument, although I might characterize it somewhat differently, one is helped. First, this statute does have a title. It's called aggravated identity theft. And while there certainly are some views of statutory construction that the title is surplusage, and that if there is a conflict or a contradiction between the title and the terms of the statute, that the terms of the statute control.

In this case, Congress meant something by calling it aggravated identity theft. It is intended to get to identity theft. And that is made clear. And the notion is that if you arrest somebody for an unrelated crime, and you

also find that [34] there *is* an identity of another person that has been stolen, then he gets a consecutive sentence.

The legislative history is very helpful, as Mr. Kiersh points out, every single instance that the—I think it's a Conference Report, or maybe a House Report, H.R. Rep 108-528, every single instance that the report cites and uses to show why this statute is required is all dealt, all 15 or more of them, dealt with the actual theft from a person. The report, under the section Purpose and Summary, says the Identity Theft Penalty Enhancement Act, H.R, 1731, addresses the growing problem of identity theft. Currently, many identity thieves receive short terms of imprisonment or probation, and after their release many go on to use false identities again. So this new statute provides, "enhanced penalties for persons who steal identities to commit terrorist acts, immigration violations, firearms offenses and other serious crimes."

Those are the predicate offenses in this part of the statute that become 1028(a) the statute we are dealing with here today. Then the report goes on to say, "The bill also amends current law to impose a higher maximum penalty for identity theft used to facilitate acts of terrorism." That's 1028(a)(7). In the background section of the conference report it says, "The term identity theft and identity fraud refer all types of crimes in which someone wrongly obtains and uses [35] another person's personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits." And it goes on from there, and then it lists all these prior decisions of courts and examples that all involve theft.

And so while I guess I wouldn't endorse Mr. Kiersh's statement that the words of the statute separate and apart from the legislative history and the title of the statute are totally ambiguous, I do think he's right that this is what the statute is all about.

The Supreme Court decisions, I think, are very helpful in that regard because they make clear that in similar situations, both in order to avoid harshness and in order to read the statute in a logical way and grammatically that the term "knowingly" modifies, must modify, both the verbs "transfer, posses or use" and modifies "a means of identification of another person."

The Chief Justice, I believe, Chief Justice Rehnquist in U.S. versus X-Citement Video said that in that case the critical determination to be made was whether the term "knowingly" modifies the phrase use of a minor—I'm sorry, modifies only the verbs "transport, ship, receive, distribute," or also modifies the other portion of the statute having to do with sexually explicit material.

And he says if we were to conclude that "knowingly" [36] only modifies the relevant verbs, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material. For instance, a retail druggist who returns an uninspected roll of developed film to a customer would be knowingly distributing a visual depiction, and would be criminally liable if the word "knowingly" only modified "use" or "receipt." Obviously, this is a different situation, but the grammatical construct that the Chief Justice uses applies equally here.

He cites earlier cases of the Supreme Court, including Morissette versus United States, 342 U.S. 246, which

is one of the key cases on mens rea in the embezzlement statute. And he cites another case that Mr. Kiersh cites, Liparota versus the United States, 471 U.S. 419. The statute's use of "knowingly" he said with respect to Liparota, could be read only to modify the verbs uses, transfers, acquires, alters or possesses. Or it could also be read to modify the words "in any manner not authorized by statute."

The Supreme Court in Liparata held that the scienter requirement applied to both elements, by invoking the background principles set forth in Morissette, he said, the principle of evil intent and, in addition, the principle of knowledge of the facts.

And then in Arthur Andersen, Chief Justice Rehnquist again said, and there the question was the phrase "knowingly [37] corruptly persuading." The government argued that "knowingly" did not modify corruptly persuades. The Chief Justice said we have recognized with regard to similar statutory language that the mens rea at least applies to the acts that immediately follow, if not to other elements down the statutory chain, citing X-Citement and Liparota. He says knowingly and knowledge are normally associated with awareness, understanding or consciousness. Only persons conscious of wrongdoing can be said to knowingly corruptly persuade in that case.

Those cases, and I'm not doing them justice, but I will come to the Beachem decision in a minute, suggest that the knowing requirement—more than suggests, held that the knowing requirement was not limited in analogous statutes to modifying simply the verbs, but that they went further down the grammatical chain to

modify other matters that Congress clearly intended, in fact that the defendant had to know, in order to have the necessary mens rea.

The Supreme Court I think in those cases, as Mr. Kiersh pointed out, looked at Congressional intent, looked at construction of the statute and the logical grammatical way to read it, but they also looked at the harshness that would result if you read it in other ways.

The Beachem case, which is the leading District Court case interpreting the statute the way I'm interpreting the statute, relied on—rejected Montejo, first of all, and [38] relied on the Supreme Court's decision in X-Citement, and held that the Court found that the "knowingly" applied both to the verbs "transfer, posses or use" but also applied to the identification of another person. In other words, that the defendant had to know that there was another actual person.

The Court held that in order to justify the additional two years imprisonment for the defendant that the United States is seeking under the statute, the United States must provide proof that Ms. Beachem had knowledge that the identification she used in fact belonged to another person.

Now, the government cited this morning, although I think it may have been cited earlier, and I have read it, Judge Hornby's opinion in United States versus Godin, 2007 Westlaw 649329, District of Maine, February 28, 2007. And Judge Hornby refused to dismiss the count because he said there was a question for the jury. There was a question for the jury in that case because the defendant said that she did not know that the number that she chose belonged to another person. The government

said that it was incredible for the defendant to claim that there was no way she could have known that at least one of these numbers, since she used false numbers seven different times, it was incredible to believe she did not know that at least one of these numbers was assigned to another individual.

And Judge Hornby found that there was a jury question [39] concerning what the defendant knows. Obviously, he was going to instruct the jury that they had to deal with what the defendant knew, and whether the defendant knew that one or more of those seven different false numbers was in fact assigned to another person. He said obviously there is a jury question over what the defendant knows. I declined to make an abstract decision on an issue that ultimately may not reflect the actual facts.

And then a footnote, cited U.S. versus X-Citement Video, saying that the term "knowingly" applied to both parts of the statute. And at one point in his opinion said the word "knowingly" after discussing Montejo, says the word "knowingly" must modify not just the verb, but also at least the object that immediately follows the verb, namely a means of identification. To be convicted, a defendant must know more than that he's transferring or possessing something, he must know that—this was an analogy he's using to a controlled substance, he must know that the something is a controlled substance.

So, "knowingly" must modify both the verb and the immediate object. Actually, as I'm looking at it, he makes a very subtle distinction, but then I think he comes out—

MR. YETTE: I hate to interrupt you, Your Honor, and I think you recognize what his distinction is, or at least let me just say the government's position is that we cannot prove [40] that he knew this number belonged to another person. However, the argument we could make, and what I think was being made in this case, is that if the defendant turned a blind eye or was reckless in creating a number, then the argument could be made he should have known it was possible, and he willfully disregarded that possibility, which is in footnote three of the opinion, of Judge Hornby's opinion, where he says even if the defendant testifies that she did not know the resulting number belonged to another person, the jury might disbelieve her or convict her of willfulness under a willful blindness instruction if the evidence supports such an instruction.

And I would simply argue that even though we don't have multiple numbers here as they did there, any time someone writes a number out of the air, the possibility exists. And that's reckless or willfully blind to the—

THE COURT: If that's your argument, I totally reject it. Whether it's supported by Godin or not, I totally reject it. You're using the word "possibility." Criminal law is not about possibilities, it's not about probabilities. It's about proof beyond a reasonable doubt. And there are situations where a willful blindness instruction is appropriate, and maybe in his case where there are seven separate numbers, and we don't know what the facts are in that case, we do know what the facts are going to be in this case. And I totally reject the idea that if somebody picks a number out of the air and just [41] happens to hit upon a real person, that that's a crime.

MR. YETTE: That's fine, I just wanted to present that argument for the Court. Thank you.

THE COURT: And what I was going to say though is—maybe I am drawing too much from Judge Hornby because I respect him so much and I find myself agreeing with him quite frequently, but what he does say here is that in doing his grammatical analysis, he says "knowingly" modifies the verb, and "knowingly" modifies the immediate object of the verb, namely "a means of identification." Then he says but the real question is, does it also modify "the secondary prepositional phrase that follows the immediate object" namely, "of another person." And he says, Beachem clearly said *yes*, and the Supreme Court in X-Citement said yes.

And he goes on to say some things, including footnote three, that the government would embrace. But then says, I leave it to the jury, because in this case because there are seven separate events or seven separate items of identification, there might be circumstantial evidence from which a jury could resolve what is a factual question.

But what is clear, it seems to me from his opinion, is that the jury would be instructed—they might also be instructed on willful blindness in his case, but they would be instructed that they have to find more that the defendant, in order to meet the scienter requirement, that the defendant [42] knowingly transferred, possessed or used. They would also be instructed by Judge Hornby that they would have to find beyond a reasonable doubt that he knowingly possessed a means of identification of another person. That's what I think he's saying. But regardless of what he's saying, that's what

the judge in Beachem said, based upon Liparota, X-Citement Video and Arthur Andersen. And that's what I'm saying.

I just don't think that Congress had in mind criminalizing and requiring under the Rule of Lenity—or ignoring the Rule of Lenity, requiring a consecutive sentence for somebody who may have picked the numbers out of the air and happened to pick numbers that belonged to the identification documents of a real person.

It's not enough to prove it was a fake card, because that's what's charged in Count Two. It's not enough to prove it's a fake card because that reads out the mens rea knowledge requirement. It's not enough to say that mens rea is provided by his plea to Count Two, because if Count Two had been a drug offense or a gun offense it would still be, hypothetically, I haven't gone through the whole list, a predicate offense under 1028(a).

I think the government's argument is inconsistent with the government's intent, as reflected in the title of the statute it chose, and the grammatical structure it chose, and the legislative history.

[43]

I think even Judge Doumar in Montejo realized that his reading of the statute could reach an absurd result. He talks in Montejo about the defense of mistake of fact, but the government has the burden of proof of statutory elements beyond a reasonable doubt, and forcing a defendant to raise an affirmative defense does not remedy the absurdity of the result reached and the ability of the government to prosecute under its reading of this stat-

ute. By divorcing the "knowingly possesses," or limiting the "knowingly" to the verbs and not requiring that it also modify the "identification of another person" one could conceivably, or hypothetically, criminalize the knowing possession of an ID that the person thought was his own, or that had mistakenly been printed with an incorrect number.

Or even though the government says it couldn't prosecute this case, couldn't prosecute—I keep coming back to this—it couldn't prosecute the case of a person who picked numbers out of the air and fortuitously didn't hit upon the numbers of a real person's ID, but they could prosecute the case of someone that fortuitously hit upon the numbers of another person's ID. And to me that's either strict liability, as Mr. Kiersh says, or it's reading out of the statute a knowledge requirement that seems to me is grammatically in the statute, and it also reads out, or undermines, the intent of Congress, which is to get at identity theft.

[44]

Judge Collyer says using a means of identification that is not one's own, this is in quotes, "Using a means of identification that is not one's own, regardless of whether it belonged to someone else, is not lawful or constitutionally protected." (A) she is reading something into the statute that's not in the statute. She goes on to say, Montejo may not have known that he was using a means of identification that belonged to someone else, but he did know that he was engaged in otherwise unlawful conduct. That's not in the statute.

And her first sentence, I think, is even inconsistent with the government's argument, but maybe not, she

says, regardless of whether it belonged to someone else. I guess the government would say, well, the specific piece of paper doesn't have to belong to someone else so long as the numbers on it, which he picked out of the air, belonged to someone else. But if that's so, they may be disagreeing with Judge Collyer, but if it's not a document that belongs to someone else, then it hasn't been stolen by someone.

And if I'm right that this entire statute was intended to deal with identity theft, as is indicated by its title and by its legislative history, then the fact that it's a document that never ever belonged to someone else can't be right.

Now, no one is saying, I don't think Mr. Kiersh is saying, I'm certainly not saying, that there has to be proof [45] that the defendant himself stole something to fall within this statute, but someone must have stolen something. He could have bought stolen property, and maybe he did, buy stolen property. He could have received stolen property, but he has to have known that this was someone else's identification.

Judge Collyer is picking up from Judge Doumar who said Montejo may not have known that he was using a means of identification that belonged to someone else, but he did know that he was engaged in unlawful conduct, and that is all that was required under X-Citement Video. (A) I think both of them are reading something into the statute that's not there. (B) it's something of a non sequitur. And (C) I think it's inconsistent with X-Citement Video.

The legislative history defines identity theft in ways that seems to me always involved the use of some other

person's personal data. And if we don't know that there was even knowledge that it belonged to another person, I don't know how we get to that point.

The legislative history, I may have quoted this before, says that the statute was intended to, "provide enhanced penalties for persons who steal identities." And I assume they mean steal or knowingly purchase or knowingly receive stolen material.

There are ways that Congress could have written an identity theft statute that would have a requisite mens rea [46] affect in it, mens rea in it. But here, let me put it this way, there may be ways to have reached the conduct involved here. One way is Count Two. There may be ways to write a statute that says whenever one buys an identity document from someone, not the person whose identity document it is, that's a crime.

There may be ways, such as is reflected in the D.C. Code receiving stolen property statute, to have a lesser scienter requirement to write in the words "reason to believe," for example, which are not in this statute even though the government wants to read them into the statute. But under the 22 D.C. Code 3232, if the government can prove either knowing that the property was stolen beyond a reasonable doubt, or having reason to believe the property was stolen beyond a reasonable doubt, that's enough for the knowledge requirement.

Now, that's another part of that statute, with intent to deprive another of a right to the property or the benefit of the property. But in terms of the knowledge requirement, they have two alternatives in the statute. One is knowing and one is reason to believe.

Just two last points. One is, as I started to give this oral opinion I said it would be much more cogent and coherent if I had written it. That has become apparent as I have gone along, but I think it's important to get this decided so we can move on to the next step.

[47]

The second thing I wanted to say was that I think during the course of much of what I said I kept referring to the defendant, the defendant, the defendant. And I think in reality, when one is doing a statutory construction and determining whether or not an indictment ought to be dismissed, this was presented to me aa a purely legal question by both sides. And I think I have to be talking about the statute in general, or the hypothetical defendant.

And so, for example in this particular case, although I think I have dealt with this in another way earlier, Mr. Yette argued earlier that we are not going to be reaching innocent conduct in this case because of his plea to Count Two, which contains one of the predicate offenses, where in other cases we would be trying to prove the predicate offenses at the same time. But his guilt or not guilt of the predicate offense is irrelevant to his guilt or innocence to 1028(a). Let me put it this way, that the fact that this happens to be an immigration offense that he's already plead guilty to should not inform the way I'm reading, or the government's argument as to how I should read 1028(a) because the predicate offense could be a non-immigration offense. It could be an offense that was going to trial at the same time. It could be a drug offense. It could be a form in connection with a gun offense.

The Supreme Court's concern about reaching innocent conduct is not whether any particular defendant on the facts [48] before any court, in this case Mr. Villanueva-Sotelo's facts, whether he has an innocent or a guilty mind, but whether the statutory interpretation itself could reach the hypothetical innocent person. The example in the X-Citement case of the innocent drug store film developer.

Here, I'm afraid that the government's interpretation could reach anyone who had an ID in his possession, and that ID had someone else's information on it, whether or not Mr. Villanueva-Sotelo—whether or not the hypothetical defendant knew that the numbers, or the information on the ID, was in fact that other person's, the victim.

Moreover, it could affect conduct where a hypothetical defendant had in his possession an identification where he picked the numbers out of the air and they happened to be Mr. Yette's identification numbers, and Mr. Yette didn't know that that was going on. How is he a victim? How is it identity theft? It is the use of his numbers on a form, but the defendant picked them out of the air. Mr. Yette has not been victimized.

Now, there are other forms of identity theft. For example, if somehow without ever stealing Mr. Yette's ATM card someone could get both the number of his card and his pin number, or his number that he has to log in, and then takes money out of his bank account. He's the victim of identity theft, even though he still has that bank card in his pocket. [49] Those are the kinds of things I think that Congress was trying to get at.

Judge Doumar in Montejo, I think, acknowledges this and says that the defendant with an innocent mind must rely on an affirmative defense of mistake. But that sort of to me undermines the intellectual integrity of the approach in Montejo. I don't mean it in any pejorative sense to my friend Judge Doumar, or certainly to my good friend Judge Collyer, but it ought not to be that a defendant has to rely on an affirmative defense of mistake. It's an awfully tortured route to say that in order to avoid what he, himself, Judge Doumar, admittedly called an absurd result.

In other words if the government, in order to interpret the statute in a way that doesn't undermine the government's theory of how it can work, I'll come up with a tortured route to get there, reading it in a grammatically odd way despite the Supreme Court cases, and I'll remedy it by saying you can always raise an affirmative defense at trial. But that's not the way criminal statutes are supposed to work. Criminal statutes are supposed to work in a way that if the defendant sits silent throughout the trial, he can still be found not guilty because the government hasn't met its burden of proof beyond a reasonable doubt. And the way that works is that we tell the jury what the elements are, and we see how it goes.

[50]

In this case, in order to make that work—I'm going to be done in three minutes. In this case, in order to see how it goes, in order to get from here to there, in order to avoid the absurd result that in Judge Domar's view can only be avoided by putting the burden on the defendant to raise an affirmative defense, I think we had to

read the statute in its logically grammatical way under the X-Citement and other cases, making "knowingly" modify both the verbs and the object, that is, "means of identification of another person." "Knowingly" has to apply to both.

That's the way it reads grammatically, that's the way the Supreme Court thinks it ought to be read, I believe, and that to me is the only way to read it consistently with what Congress really intended by calling this an identity theft statute, as indicated by the title of the statute, in the legislative history. The word "knowingly" applies to both the verb and the means of identification.

And for all of those reasons I'm going to dismiss Count Three of the indictment.

* * * * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3055

September Term, 2007
06cr00271-01

UNITED STATES OF AMERICA, APPELLATE

v.

GUSTAVO VILLANUEVA-SOTELO, APPELLEE

[Filed: June 13, 2008]

ORDER

Before: SENTELLE,* Chief Judge, and GINSBURG, HENDERSON,** RANDOLPH, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH,* Circuit Judges.

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

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* Chief Judge Sentelle, and Circuit Judge Henderson and Kavanaugh would grant the petition for rehearing en banc.

** A separate statement by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 07-3055
September Term, 2007

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting from the denial of rehearing en banc:

Identify theft is rampant in this country. To combat it, the Congress substantially increased the penalty therefor by enacting the Identify Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004). The Act provides in relevant part:

> Whoever, during and in relation to any felony violation enumerated in [§ 1028A(c)], *knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person*, shall in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1) (emphasis added). Three of our sister circuits—the Fourth, the Eighth and the Eleventh—held that the highlighted languages does not require the Government to prove that the defendant know that the false means of identification he possess is that "of another person." *United States v. Montejo*, 442 F.3d 213, 217 (4th Cir.), *cert denied*, 127 S. Ct. 366 (2006); *United States v. Hines*, 472 F.3d 1038, 1039-40 (8th Cir.), *cert. denied*, 128 S. Ct. 235 (2007); *United States v. Hurtado*, 508 F.3d 603, 610 (11th Cir. 2007); *see also United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915

(8th Cir. 2008). The panel majority in this appeal then produced its outlier opinion reaching the opposite conclusion regarding the requisite scienter and thereby created a conflict among the circuits. A circuit split is always troubling but it is even more so where, as here, the opinion causing the split is so plainly mistaken. I respectfully dissent from the *en banc* denial.